

TENNESSEE CODE ANNOTATED

2021 ADVANCE CODE SERVICE

Pamphlet Number 3
June 2021

Updates 2020 Supplement

Prepared by the Editorial Staff of the Publisher



LexisNexis®

COPYRIGHT © 2021

BY

THE STATE OF TENNESSEE

All rights reserved.

ISBN 978-0-327-11154-2

www.lexisnexis.com

Customer Service: 1-800-833-9844

Preface

The Advance Code Service has been approved by the Tennessee Code Commission as part of the Tennessee Code Annotated annual upkeep service and is an official part of the Code. Advance Code Service pamphlets keep your Tennessee Code Annotated set as up-to-date as possible by providing notes to cases, Attorney General opinions and law reviews, as well as other pertinent information, three times a year in the interim between shipment of Code supplements. Each pamphlet is cumulative, so you can recycle a pamphlet when you receive its replacement.

Material in the Advance Code Service follows the arrangement of Tennessee Code Annotated and should be used in conjunction with the Code and its 2020 Supplements.

This publication contains annotations reflecting decisions or articles posted to Lexis Advance through April 15, 2021.

South Western Reporter, 3d Series
Supreme Court Reporter
Federal Reporter, 3d Series
Federal Supplement, 2d Series
Bankruptcy Reporter
Opinions of the Attorney General
Tennessee Bar Journal
University of Memphis Law Review
Vanderbilt Law Review
Workers' Compensation Appeals Board Decisions

Suggestions, comments, or questions about the Tennessee Code Annotated are always welcome. You may call us toll free at (800) 833-9844, email us at customer.support@lexisnexis.com or write Tennessee Editor, LexisNexis, 555 Middle Creek Parkway, Colorado Springs, Colorado 80921.

Visit our Internet home page at **www.lexisnexis.com** for an online bookstore, technical support, customer service, and other company information.

June 2021

LEXISNEXIS

CONSTITUTION OF THE UNITED STATES

1787

AMENDMENTS

IN ADDITION TO, AND AMENDMENT OF, THE
CONSTITUTION OF THE UNITED STATES
OF AMERICA, PROPOSED BY CONGRESS,
AND RATIFIED BY THE LEGISLATURES
OF THE SEVERAL STATES PURSUANT
TO THE FIFTH ARTICLE OF THE
ORIGINAL CONSTITUTION

AMENDMENT 5

**[Criminal actions — Provisions concerning — Due process of law
and just compensation clauses.]**

NOTES TO DECISIONS

ANALYSIS

- 17. Double Jeopardy.
- 32. —Crimes.
- 17. Double Jeopardy.
- 32. —Crimes.

Because the Money Laundering Act of 1996 specifically directed that money laundering of

fenses should be separately punished from any related specified unlawful activity, the General Assembly's intent to permit multiple punishments was clear; thus, defendant's conviction of both offenses - the January 9 delivery of marijuana and the January 13 promotional money laundering - did not violate double jeopardy protections. *State v. Allison*, — S.W.3d —, 2021 Tenn. LEXIS 3 (Tenn. Jan. 14, 2021).

AMENDMENT 14

§ 1. [Citizenship — Due process of law — Equal protection.]

NOTES TO DECISIONS

ANALYSIS

- 19. Due Process.
- 21. —Procedural Due Process.
- 23. —Vagueness.
- 19. Due Process.
- 21. —Procedural Due Process.

In a breach of contract case, a Tennessee court could exercise specific personal jurisdiction over the Texas corporation because, after evaluating the Texas corporation's contacts

with Tennessee related to the contract that formed the basis for the Tennessee company's suit, the circumstances exhibited intentional or purposeful acts on the part of the Texas corporation; the Texas corporation's contacts were substantial enough as it voluntarily elected to contract with the Tennessee company, and the Texas corporation knew that the contractual work would occur primarily in Tennessee; and the Texas corporation did not carry its burden of establishing that the exercise of personal jurisdiction in Tennessee would be unreason-

able or unfair. Crouch Ry. Consulting, LLC v. LS Energy Fabrication, LLC, — S.W.3d —, 2020 Tenn. LEXIS 412 (Tenn. Oct. 6, 2020).

23. —Vagueness.

Statute was not unconstitutionally vague as defendant had fair warning that using illegal proceeds to promote further criminal activity violated the money laundering statute because the common understanding of the phrase “carrying on” plainly encompassed defendant’s conduct as to his money laundering conviction as

he previously had delivered marijuana to the confidential informant (CI) with an expectation that she would sell the product and pay him with proceeds from the sales; he later received cash payment with a stated intent to purchase more marijuana, which he would then sell to the CI for her to re-sell to customers; and he then, in fact, did purchase more marijuana, a portion of which he delivered to the CI for her to re-sell. State v. Allison, — S.W.3d —, 2021 Tenn. LEXIS 3 (Tenn. Jan. 14, 2021).

CONSTITUTION OF THE STATE OF TENNESSEE

[ADOPTED IN CONVENTION AT NASHVILLE, FEBRUARY 23, 1870.
PROCLAIMED AND IN EFFECT, MAY 5, 1870,
AS AMENDED.]

ARTICLE I DECLARATION OF RIGHTS

Sec. 5. Elections to be free and equal — Right of suffrage.

NOTES TO DECISIONS

4. Extent of Legislative Control.

Registered voters without special vulnerability to COVID-19 were unlikely to succeed on their claims that the State's construction of T.C.A. § 2-6-201(5)(C) and (D) violated Tenn. Const. art. 1, § 5, where the burden on the right to vote was moderate given that the risk for in-person voting was significantly less than

for those vulnerable to the virus, and when weighed against the State's interests in voter fraud prevention, fiscal responsibility, and feasibility, the moderate burden placed on the right to vote was justified. *Fisher v. Hargett*, 604 S.W.3d 381, 2020 Tenn. LEXIS 283 (Tenn. Aug. 5, 2020).

Sec. 7. Unreasonable searches and seizures — General warrants.

NOTES TO DECISIONS

ANALYSIS

5. Warrants.
10. —Informants.
11. —Affidavits.
18. Search and Seizure.
22. —Probable Cause.
25. —Automobiles.
26. —Consent.
29. —Investigative Stops.
35. —Incident to Lawful Arrest.
39. —Civil Investigative Demands.
- 39.5. —Reasonable suspicion.
40. Warrantless Arrest.
41. —Probable Cause.
51. Exclusionary Rule.
52. —Inevitable Discovery.
55. Reasonable Suspicion.
56. Expectation of Privacy.

5. Warrants.

10. —Informants.

Trial court properly determined that the information as to the credibility and veracity of the confidential informant (CI) in the affidavit supporting the search warrant was correct because the CI had been used on prior occasions, the police independently corroborated much of

the information that the CI provided to the police, and nothing indicated that the CI was under the influence of heroin when he bought heroin from the seller. *State v. Haithcote*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 550 (Tenn. Crim. App. Aug. 11, 2020).

11. —Affidavits.

Trial court did not err in its determination that the information contained in the affidavit was sufficient to establish probable cause for the issuance of a search warrant because the affidavit established the confidential informant's basis of knowledge in that he knew defendant sold methamphetamine, he had been at defendant's residence within the last 72 hours, and while at the residence had seen methamphetamine in defendant's possession, which was enough to establish a sufficient nexus between the criminal activity, the place to be searched, and the items to be seized. *State v. Borden*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 515 (Tenn. Crim. App. July 27, 2020).

Nexus of activity at the seller's home and the conduct of the confidential informant (CI) were not too remote to establish probable cause to obtain a search warrant and an arrest warrant of defendant because the drug sale, during

which defendant provided heroin to the seller who sold it to the CI, was closely monitored and the search warrant was issued the same day as the sale. *State v. Haithcote*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 550 (Tenn. Crim. App. Aug. 11, 2020).

Trial court erred in denying defendant's motion to suppress evidence obtained pursuant to a search warrant for the contents of defendant's cell phone because the warrant lacked the required particularity as the affidavit sought an unfettered search of all data on the cell phone and did not specify the specific types of data which had relevance to the investigation or the factual basis for the affiant's belief that the data existed. The error was harmless beyond a reasonable doubt as the proof at trial of defendant's guilt was overwhelming. *State v. McLawhorn*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 686 (Tenn. Crim. App. Oct. 20, 2020).

18. Search and Seizure.

22. —Probable Cause.

In denying defendant's motion to suppress, the seized evidence was admissible as it was obtained pursuant to a valid search warrant supported by probable cause because the officers smelled the odor of raw marijuana emitting from the interior of defendant's motel room; and defendant stated that there was marijuana in a nightstand in the room. *State v. Shanklin*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 99 (Tenn. Crim. App. Mar. 22, 2021).

25. —Automobiles.

Trial court did not err by denying defendant's motion to suppress because the officer was permitted to ask the vehicle's passengers for identification, given that one passenger was moving around in the backseat, they acted nervously, and all of the occupants were breathing heavily. The officer was permitted to ask one passenger to step out of the vehicle because he had received inconsistent answers about their destination. *State v. Austin*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 695 (Tenn. Crim. App. Oct. 27, 2020).

26. —Consent.

Defendant's consent to search was not voluntary because at least nine armed law enforcement officers converged on defendant's home with guns drawn, for thirty minutes defendant refused orders to come outside because she was having a panic attack due to the armed deputies in her yard, and after she finally exited her residence, defendant was detained by deputies who continued to ask her for another thirty minutes for consent to search her home for a suspect. *State v. Scott*, — S.W.3d —, 2020 Tenn. LEXIS 600 (Tenn. Feb. 28, 2021).

Defendant's consent to the search was voluntary because he was 26 years old, had a crimi-

nal history involving several interactions with law enforcement, had no type of physical or mental disability, and the officers had credibly testified that they did not have their weapons drawn when defendant gave consent. *State v. Robinson*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 96 (Tenn. Crim. App. Mar. 17, 2021).

29. —Investigative Stops.

Officer's activation of his emergency lights constituted a seizure and the officer's observations that the occupants of the van did not appear to have been wearing seat belts was a basis of establishing probable cause or reasonable suspicion to initiate a stop, which was not challenged by second and third defendants and thus, defendants were not entitled to relief from the denial of the motion to suppress. *State v. Morales*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 619 (Tenn. Crim. App. Sept. 18, 2020).

Because defendant was prohibited from making a U-turn by municipal ordinance and the ordinance was not in conflict with state law, defendant's violation of that ordinance resulted in a constitutional stop based on the officer's reasonable suspicion that a traffic violation had occurred and the trial court did not err in granting defendant's motion to suppress. *State v. Love*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 659 (Tenn. Crim. App. Oct. 8, 2020).

Sergeant had reasonable suspicion to make a brief investigatory stop, and therefore the trial court did not err in denying defendant's motion to suppress, because the victim reported that her house had been fired upon, that she had surveillance equipment, and that she had viewed the recording and saw shots fired from a white or cream-colored vehicle, the location where the sergeant observed the vehicle was in close proximity to the victim, only a short period of time had elapsed between the victim's report and the sergeant's observation of the vehicle, and the sergeant testified that there were few other cars on the road at that time. *State v. Kea*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 72 (Tenn. Crim. App. Mar. 4, 2021).

35. —Incident to Lawful Arrest.

Trial court erred by suppressing the drug evidence because the officers could search the car incident to defendant's arrest, and it was reasonable to believe that the car contained evidence related to defendant's arrest for DUI; and the trial court erred by suppressing the drug evidence as fruit of the poisonous tree as the trial court did not make any finding of coercion by the police. *State v. Helmick*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 758 (Tenn. Crim. App. Nov. 30, 2020).

39. —Civil Investigative Demands.

39.5 —Reasonable suspicion.

Trial court erred by granting defendant's motion to suppress because defendant's seizure

was supported by reasonable suspicion, as the informant was a known, citizen informant and the information he provided to police via the 9-1-1 dispatcher could be presumed reliable and the officer corroborated the information provided by the tip. Within one minute of receiving the information about the possibility of a female DUI driver, the officer located the potential vehicle and he confirmed his findings with dispatch. *State v. Moore*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 574 (Tenn. Crim. App. Aug. 25, 2020).

40. Warrantless Arrest.

41. —Probable Cause.

Officers had probable cause to arrest defendant for driving under the influence because the officers found the car near midnight in the middle of a parking lot of a closed business; the driver's door was open, and defendant was lying on his back next to the open door; the key was in the car's ignition, the engine was running, and no one but defendant was present; he told the officers that he was trying to get home; and the officers said that defendant had difficulty following their commands and that he did not seem to be in his right frame of mind. *State v. Helmick*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 758 (Tenn. Crim. App. Nov. 30, 2020).

51. Exclusionary Rule.

52. —Inevitable Discovery.

Inevitable discovery doctrine did not apply because there was no probable cause for deputies to obtain a search warrant for defendant's home without relying on the information they gathered during the initial search; the only information law enforcement had at the time they surrounded defendant's home was that a possibly armed male, who had multiple arrest

warrants might have entered the house. *State v. Scott*, — S.W.3d —, 2020 Tenn. LEXIS 600 (Tenn. Feb. 28, 2021).

55. Reasonable Suspicion.

Stop of defendant was constitutionally permissible, and defendant's motion to dismiss was properly denied because an officer had probable cause to stop defendant based on his observation that defendant did not have two "red" taillights and two "red" stoplights on the rear of the vehicle, and that defendant's right taillight was not in good condition and operational in violation of a traffic law; and, although an attempt to repair the broken taillight was made with taillight repair tape, that repair failed to allow for sufficient illumination, which provided the officer with an articulable and reasonable suspicion that defendant's taillight violated a traffic law. *State v. Rivera*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 481 (Tenn. Crim. App. July 15, 2020).

56. Expectation of Privacy.

In denying defendant's motion to suppress, although defendant had a reasonable expectation of privacy in the motel room that he rented, he had no expectation of privacy in the sights, sounds, and smells detectible in the breezeway; and the presence of law enforcement officers on the motel breezeway was not a search. *State v. Shanklin*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 99 (Tenn. Crim. App. Mar. 22, 2021).

In denying defendant's motion to suppress, officers' smelling the door jambs of a motel room did not violate defendant's reasonable expectation of privacy as the officers were in a place that they had a right to be present. *State v. Shanklin*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 99 (Tenn. Crim. App. Mar. 22, 2021).

Sec. 8. No man to be disturbed but by law.

Attorney General Opinions. HB 2919/SB 2925, 111th Tenn. Gen. Assem. (2020), which is intended to exempt the city of Athens from the operation of TCA § 67-4-1425(a) by means of a narrow population bracket, raises constitutional concerns. Both article I, section 8 and article XI, section 8 of the Tennessee Constitution require that a population bracket designed to exempt a particular county or municipality

from a tax law be supported by some rational basis related directly to the size of the bracketed population. Because there does not appear to be such a rational basis for creating a narrow population-bracket exception from TCA § 67-4-1425 for the city of Athens, the proposed legislation raises significant constitutional concerns. OAG 20-12, 2020 Tenn. AG LEXIS 16 (6/12/2020).

NOTES TO DECISIONS

ANALYSIS

1. General Notes.
needs Catchline
29. Law of the Land — Due Process.
32. —Procedural Due Process.

34. —Vagueness.
41. —Criminal Law and Procedure.
47. —Delay in Bringing to Trial.
49. —Evidence.
50. —Discovery.
52. Fair Trial.

1. General Notes.**needs Catchline**

Mother's procedural due process rights were not violated where although the juvenile court may have erroneously admitted some pieces of evidence, it admitted and considered sufficient competent evidence to render the erroneous evidence redundant, cumulative, and harmless. Additionally, the juvenile court had allowed the mother to present arguments and to introduce proof contradicting that presented by the Department of Children's Services. *In re River L.*, — S.W.3d —, 2021 Tenn. App. LEXIS 83 (Tenn. Ct. App. Mar. 6, 2021).

29. Law of the Land — Due Process.**32. —Procedural Due Process.**

Entry of judgment on an appeal bond for attorney fees was appropriate because the party which procured the appeal bond was not denied due process in violation of U.S. Const. amend. XIV and Tenn. Const. art. I, § 8 as the surety filed a motion seeking the trial court's guidance and specifically afforded the party the opportunity to respond and raise defenses, the party filed a substantive response, and the party had the opportunity in a hearing to offer testimony, evidence, and argument in support of the party's position. *Nelson v. Justice*, — S.W.3d —, 2021 Tenn. App. LEXIS 91 (Tenn. Ct. App. Mar. 9, 2021).

34. —Vagueness.

Statute was not unconstitutionally vague as defendant had fair warning that using illegal proceeds to promote further criminal activity violated the money laundering statute because the common understanding of the phrase "carrying on" plainly encompassed defendant's conduct as to his money laundering conviction as he previously had delivered marijuana to the confidential informant (CI) with an expectation that she would sell the product and pay him with proceeds from the sales; he later received cash payment with a stated intent to purchase more marijuana, which he would then sell to the CI for her to re-sell to customers; and he then, in fact, did purchase more marijuana, a portion of which he delivered to the CI for her to re-sell. *State v. Allison*, — S.W.3d —, 2021 Tenn. LEXIS 3 (Tenn. Jan. 14, 2021).

41. —Criminal Law and Procedure.**47. —Delay in Bringing to Trial.**

Defendant's due process rights were not violated due to a three and one-half year delay in prosecuting the case where the delay was due in large part to some level of incompetence or inaction of the initial investigator and not to gain a tactical advantage or harass defendant, and defendant did not suffer any prejudice. *State v. Golden*, — S.W.3d —, 2020 Tenn. Crim.

App. LEXIS 692 (Tenn. Crim. App. Oct. 23, 2020).

49. —Evidence.

Defendant failed to show that she was not afforded her right to due process because a witness's second statement was not disclosed before trial, as the statement was not exculpatory to defendant and the defense was able to interview the witness and make an informed decision as to his credibility and value as a witness. *State v. Smith*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 61 (Tenn. Crim. App. Feb. 25, 2021).

Defendant's right to due process was not violated based on her being prevented from viewing the evidence until four days before trial because her attorney conceded that she had been invited on two previous occasions to review the evidence, but was unable to do so; she viewed the evidence before trial, and she raised the chain of custody concerns during the trial, effectively cross-examining the State's witnesses in that regard; and the photographs that were provided to defendant were not so substantially different than the photographs that were not provided to defendant that they delay cause a constitutional violation. *State v. Robinson*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 96 (Tenn. Crim. App. Mar. 17, 2021).

Denial of defendant's motion to suppress was proper as the State did not have a duty to preserve the vehicle for later production to defendant, the efforts to retrieve evidence from the vehicle before its release were thorough and extensive, and the items taken from the vehicle were all preserved and available to defendant for analysis. *State v. Rimmer*, — S.W.3d —, 2021 Tenn. LEXIS 71 (Tenn. Apr. 16, 2021).

50. —Discovery.

Trial court did not err by denying defendant's motion to dismiss based upon lost or destroyed evidence of recordings from a deputy's dash and body cameras utilized at time of a traffic stop and by providing a jury instruction relative to the State of Tennessee's duty to preserve evidence because the nonexistence of the recordings occurred through inadvertence and was due to an equipment malfunction and other evidence, including defendant's incriminating statements during a police interview at the jail, was sufficient to support the convictions. *State v. Johnson*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 545 (Tenn. Crim. App. Aug. 7, 2020).

When the existence of photographs were not disclosed until a sheriff's sergeant testified at trial to having taken photographs with the sergeant's cell phone of the heroin and cocaine found at the scene of a traffic stop but to forgetting about the photographs until the sergeant's trial testimony, defendant was not entitled to relief because the photographs were inculpatory and would have corroborated the testimony of witnesses about the events during

the traffic stop and the result of the proceeding would not have been different. *State v. Johnson*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 545 (Tenn. Crim. App. Aug. 7, 2020).

52. Fair Trial.

Defendant's prosecution for aggravated rape was not barred by the statute of limitations because the statute of limitations was tolled as defendant was not ordinarily and openly living

in Tennessee when incarcerated in and living as a resident of Louisiana. Furthermore, defendant did not establish that the pre-indictment delay violated defendant's right to a fair trial as defendant did not show that defendant suffered any actual prejudice as a result of the delay or that the State of Tennessee caused the delay to obtain a tactical advantage. *State v. Jackson*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 112 (Tenn. Crim. App. Mar. 25, 2021).

Sec. 9. Right of the accused in criminal prosecutions.

NOTES TO DECISIONS

ANALYSIS

2. Due Process.
9. Right to Counsel.
13. —Competency of Counsel.
14. —Post-conviction Review.
15. —Effective Assistance Not Denied.
16. —Effective Assistance Denied.
20. —Waiver.
21. —Forfeiture.
28. —Self-Representation.
29. Right to Demand Nature and Cause of Accusation.
33. —Notice of Offense Sufficient.
39. Right to Be Informed of Constitutional Rights.
40. Right to Meet Witnesses Face to Face.
59. —Impeachment.
64. Right to Compulsory Process.
65. Right to Speedy Trial.
70. Trial by Impartial Jury.
74. —Jury Instructions.
88. —Exclusion of Juror.
96. —Appellate Review.
100. Venue.
105. Right Against Self-Incrimination.
107. —Confessions.
111. —Miranda.
- 119.5.—Prosecutor's Comments.

2. Due Process.

Defendant was not entitled to relief on his claim that his statement should have been suppressed, where defendant voluntarily reinitiated his conversation with a detective after telling the detective that he had an attorney. Defendant did not allege that the detective coerced him into reinitiating the conversation, and the video of the interview showed that the detective did not say anything before defendant began asking questions about his case and voluntarily made the statement at issue. *State v. Banks*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 583 (Tenn. Crim. App. Aug. 25, 2020).

9. Right to Counsel.

13. —Competency of Counsel.

14. —Post-conviction Review.

Supreme Court of Tennessee expressly overruled its holding in *Wallace v. State* that trial counsel's failure to file a timely motion for new trial was presumptively prejudicial so long as the petitioner indicated a desire to appeal and held that the postconviction court properly considered both prongs of the Strickland analysis. *Howard v. State*, 604 S.W.3d 53, 2020 Tenn. LEXIS 268 (Tenn. July 16, 2020).

In an aggravated sexual battery case, trial counsel was not ineffective for failing to present evidence of defendant's erectile dysfunction because counsel testified that she felt it was strategically necessary to present proof that defendant was sexually active with the victim's mother as she felt that the defense needed to provide an explanation for the child victim's sexual knowledge as an alternative to the explanation that she gained the knowledge through abuse by defendant; and the evidence would have been in conflict with defendant's own testimony. *Davis v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 512 (Tenn. Crim. App. July 27, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 537 (Tenn. Oct. 7, 2020).

In an aggravated sexual battery case, trial counsel was not ineffective for failing to investigate or call two witnesses because the testimony of the witnesses at the post-conviction hearing only had bearing on defendant's general character and on his back injury; at trial, defendant's mother, sister, and wife gave similar testimony about his character and injury; the witnesses actually presented at trial were able to give more detailed testimony and also had testimony that was relevant to defendant's relationship with the child victim; and there was no reasonable probability that, had the omitted witnesses been presented at trial, the result of the proceeding would have been differ-

ent. *Davis v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 512 (Tenn. Crim. App. July 27, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 537 (Tenn. Oct. 7, 2020).

Record supported the post-conviction court's finding that trial counsel's advice that petitioner testify was a reasonable tactical decision. Trial counsel was not deficient in making a judgment call based upon adequate preparation and, from all accounts, a conscientious and flexible approach to difficult circumstances at trial. *Jackson v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 580 (Tenn. Crim. App. Aug. 25, 2020).

Trial counsel was not ineffective because, during the guilty plea colloquy, counsel advised the court that he would be recommending defendant for placement at a special needs facility, and the trial court noted the recommendation on the judgment form; and counsel testified at the post-conviction hearing that he neither misled defendant into believing nor guaranteed to defendant that he would serve his sentence at the special needs facility. *Aldridge v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 648 (Tenn. Crim. App. Sept. 29, 2020).

Defendant's petition for post-conviction relief was properly denied as trial counsel was not ineffective in failing to file a motion to suppress because nothing in the letters from defendant's cellmate indicated that he was being directed to act or compensated for eliciting information from defendant; and the appellate court had all the existing evidence pertinent to any agreement made by the government, acting through a detective, with the cellmate when it concluded that the cellmate was not a State agent. *Frelix v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 653 (Tenn. Crim. App. Oct. 5, 2020).

Defendant's petition for post-conviction relief was properly denied because defendant failed to show that his guilty plea was not knowingly, voluntarily, and intelligently made with the effective assistance of counsel as he stated that he was not forced to enter his plea and that no one had promised him anything; and he admitted that he never told the trial court at the guilty plea submission hearing that he felt pressured to accept the plea. *Griffin v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 762 (Tenn. Crim. App. Nov. 30, 2020).

Defendant's petition for post-conviction relief was properly denied as trial counsel was not ineffective for failing to file a motion to continue to have more time to consider and research the issue of the jail calls because he did not demonstrate that a motion to continue would have been granted; he did not show or allege in his brief how a continuance or additional research would have changed the outcome of his case; and the post-conviction court accredited trial counsel's testimony that he was prepared for trial. *Griffin v. State*, — S.W.3d —, 2020 Tenn.

Crim. App. LEXIS 762 (Tenn. Crim. App. Nov. 30, 2020).

Defendant's petition for post-conviction relief was properly denied as trial counsel was not ineffective for failing to file a motion to suppress the jail calls with his mother because, while counsel did not file a motion to suppress the calls, he filed a motion in limine to exclude the portions of the calls during which defendant made reference to what he said in the police interrogation that had been suppressed pursuant to an earlier suppression motion filed by initial counsel; and he failed to prove that a motion to suppress would have been granted. *Griffin v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 762 (Tenn. Crim. App. Nov. 30, 2020).

Inmate did not put forth any testimony that his attorney had coerced him in any way into pleading guilty or allege that he was intoxicated prior to the post-conviction hearing. The testimony showed that trial counsel met with the inmate on multiple occasions and thoroughly explained the pros and cons of pleading guilty and proceeding to trial. *Sanders v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 773 (Tenn. Crim. App. Nov. 30, 2020).

It was proper to deny petitioner post-conviction relief because counsel was not deficient in his trial preparation; relative to the trial counsel's alleged failure to prepare petitioner to testify, the record was devoid of any evidence regarding counsel's discussions with petitioner since neither petitioner nor trial counsel were questioned at the post-conviction hearing about preparation to testify, or lack thereof. *Pence v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 82 (Tenn. Crim. App. Mar. 8, 2021).

It was proper to deny petitioner post-conviction relief because counsel was not deficient in his trial preparation; counsel and petitioner met numerous times at the jail and after petitioner was released on bond, counsel hired an investigator to interview witnesses and seek information about a possible third-party perpetrator, and counsel filed discovery motions and attempted unsuccessfully to have petitioner's confession suppressed. *Pence v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 82 (Tenn. Crim. App. Mar. 8, 2021).

It was proper to deny petitioner post-conviction relief because trial counsel was not deficient in his failure to provide audio recordings; trial counsel testified that he reviewed the discovery with petitioner a "multitude" of times, and the audio recording was played at the suppression hearing, where petitioner was present. *Pence v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 82 (Tenn. Crim. App. Mar. 8, 2021).

Record supported the post-conviction court's findings that trial counsel's investigation was not deficient because trial counsel hired a private investigator, and counsel spoke with the

victims' mother on multiple occasions at the behest of petitioner; petitioner did not offer other evidence or other witnesses that trial counsel should have investigated. *Pence v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 82 (Tenn. Crim. App. Mar. 8, 2021).

15. —Effective Assistance Not Denied.

Postconviction court did not err by determining that even though trial counsel's performance was deficient for failing to timely file a motion for new trial, petitioner was not prejudiced because of the overwhelming evidence against him at trial. *Howard v. State*, 604 S.W.3d 53, 2020 Tenn. LEXIS 268 (Tenn. July 16, 2020).

Petitioner failed to show that his counsel was ineffective for failing to file motions for change of venue and for recusal of the trial judge because counsel testified he did not believe the motion for change of venue would have been successful since there was no publicity surrounding the crimes and that the motion for recusal would not have been successful because there was no proof of any relationship between the judge and the police officer that would cause impartiality. *Johnson v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 564 (Tenn. Crim. App. Aug. 14, 2020).

Petitioner failed to show that his counsel was ineffective for failing to adequately investigate other potential witnesses who may have supported his defense because he failed to identify those witnesses or present their testimony. *Johnson v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 564 (Tenn. Crim. App. Aug. 14, 2020).

Petitioner failed to show that his counsel was ineffective for advising him to proceed with a bench trial rather than a jury trial because petitioner made an informed decision, based on the well-reasoned advice of counsel, to opt for a bench trial, and petitioner's decision to have a bench trial resulted in a not guilty verdict as to especially aggravated kidnapping, which benefitted him. *Johnson v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 564 (Tenn. Crim. App. Aug. 14, 2020).

Denial of post-conviction relief was appropriate because defendant failed to demonstrate deficiency or prejudice with regard to defendant's claims of ineffective assistance of counsel as defendant failed to establish a reasonable probability that the outcome of the proceeding would have changed if defendant's trial counsel had performed the acts which defendant claimed were necessary for counsel to have performed. *Davis v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 576 (Tenn. Crim. App. Aug. 25, 2020).

Petitioner failed to show that his counsel performed deficiently in assisting him with his guilty plea, and therefore he was properly denied postconviction relief, because the postcon-

viction court found that counsel provided discovery to petitioner, discussed the case with him on several occasions, and informed him of the available options. At the plea colloquy petitioner testified that he discussed the facts of the case with counsel and that counsel answered all of his questions sufficiently, and counsel testified that petitioner was adamant about pleading guilty even after reviewing the discovery. *Lucas v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 622 (Tenn. Crim. App. Sept. 18, 2020).

Petitioner failed to show that his counsel was deficient for failing to seek a second mental evaluation following his stroke, or how the lack of a second mental evaluation was prejudicial to him, because counsel testified that she met with him both before and after the stroke, she noted that although the he was more physically weak following the stroke he demonstrated nothing to indicate a concern regarding his mental competency, and counsel's observations of petitioner were supported by the transcript of the plea colloquy. *Wright v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 633 (Tenn. Crim. App. Sept. 24, 2020).

Petitioner failed to show by clear and convincing evidence that his counsel failed to investigate his case or failed to discuss possible defenses with him, and therefore he was properly denied postconviction relief on his ineffective assistance of counsel claim, because counsel testified that she reviewed all of the discovery with petitioner and discussed possible defenses, but his admission to sexual activity with the seven-year-old victim left few options for a defense strategy, a mental evaluation determined that petitioner was competent to stand trial and that he appreciated the wrongfulness of his conduct, and counsel negotiated the lowest possible sentence and explored alternative sentencing due to petitioner's age and health issues. *Wright v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 633 (Tenn. Crim. App. Sept. 24, 2020).

Although defendant claimed that defendant's trial counsel denied defendant of defendant's fundamental right to testify, defendant failed to prove that counsel's performance as to this issue was deficient or prejudicial because, although counsel encouraged defendant not to testify, it was ultimately defendant's decision to voluntarily and personally waive the right to testify. *Alvarado v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 638 (Tenn. Crim. App. Sept. 25, 2020).

Inmate's claim that counsel was ineffective for failing to interview material witnesses lacked merit because the inmate failed to prove that but for counsel's failure the inmate would not have entered a plea of guilty. *Freemon v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 673 (Tenn. Crim. App. Oct. 13, 2020).

Defendant was not entitled to post-conviction relief because any error by trial counsel in failing to object to the testimony of a witness, who was responsible for monitoring inmate phone calls for the sheriff's office, regarding the recordings of defendant's phone calls from jail on the ground that the State of Tennessee had not qualified the witness as an expert in voice recognition was harmless as defendant readily admitted under cross-examination at trial that it was defendant's voice on the calls. *Harris v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 683 (Tenn. Crim. App. Oct. 16, 2020).

Defendant was not entitled to post-conviction relief because defendant did not prove that trial counsel was ineffective by not calling witness as defendant failed to present the proposed witnesses or a mental health expert at the post-conviction hearing. Defendant also failed to establish that trial counsel was ineffective in failing to present a mental health defense as there was no proof at the post-conviction hearing to establish if or how defendant's diagnosis of generalized anxiety disorder impacted the offense. *Harris v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 683 (Tenn. Crim. App. Oct. 16, 2020).

Defendant was not entitled to post-conviction relief because defendant failed to prove resulting prejudice from defendant's ineffective assistance of counsel claims based on trial counsel failing to subpoena alibi witnesses to testify, failing to present video evidence to show that defendant was not at the scene of the crime, and failing to challenge an allegedly biased juror. Defendant failed to show prejudice as defendant did not present the alibi witnesses to testify, show the video evidence, or call the juror at the evidentiary hearing. *Lee v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 706 (Tenn. Crim. App. Oct. 30, 2020).

Defendant was not entitled to post-conviction relief because defendant failed to prove that defense counsel did not allow defendant to effectively participate in defendant's own defense. Furthermore, counsel was not ineffective for failing to file a motion to sever the child neglect, aggravated child abuse, and felony murder counts against defendant for separate trials because the cases were mandatorily joined as the incidents were part of a single continuing episode of multiple abuse of the victim over the course of days. *Demeza v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 707 (Tenn. Crim. App. Oct. 30, 2020).

Petitioner failed to show that he was prejudiced by trial counsel's deficiencies in investigating, and therefore he was properly denied postconviction relief, because there was no indication that the victim would have testified about pointing a gun at petitioner, as the victim testified that he did not experience the change of heart leading him to recant his trial testimony until he had been in prison for some

years, and petitioner did not present any other witness or evidence that additional investigation would have revealed. *Harbison v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 740 (Tenn. Crim. App. Nov. 17, 2020).

Petitioner failed to show that his counsel was ineffective for failing to raise self-defense at trial because counsel testified that petitioner never told him that the victim pointed a gun at him and counsel used petitioner's statement that the State could not prove he intended to kill the victim because the victim was only shot in the leg as a starting point for the alternative defense theory. *Harbison v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 740 (Tenn. Crim. App. Nov. 17, 2020).

Defendant failed to show that defendant was denied the effective assistance of counsel when trial counsel failed to move for a mistrial due to only having eleven jurors when, after the alternate jurors were dismissed, another juror was dismissed due to a family tragedy; to file a motion to dismiss the indictment due to loss or destruction of evidence as the exculpatory value of the evidence was speculative at best and counsel's motion for special jury instruction was denied; and to object to improper prosecutorial argument. *Wicks v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 749 (Tenn. Crim. App. Nov. 20, 2020).

Although defendant claimed that appellate counsel was ineffective for failing to preserve and raise the issue on direct appeal of improper prosecutorial argument when a prosecutor's statements involved the prosecutor's personal opinions on the truth or falsity of evidence and defendant's guilt, the relevant case law factors weighed against reversible error because, even though the prosecutorial statements were improper, the proof at trial was strong. *Wicks v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 749 (Tenn. Crim. App. Nov. 20, 2020).

Petitioner failed to show that his counsel was ineffective for failing to inform him of the deadline set by the trial court for accepting the State's plea offer, and therefore he was properly denied postconviction relief, because counsel testified that he timely communicated the offer to petitioner and informed him that there was a settlement date in the case, and counsel's testimony was supported by the trial court's scheduling order. *Pillow v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 774 (Tenn. Crim. App. Dec. 1, 2020).

Defendant failed to prove that trial counsel was ineffective for failing to communicate to the State of Tennessee defendant's acceptance of an alleged plea offer because the post-conviction court found that defendant failed to prove by clear and convincing evidence the existence of the plea offer from the State. Defendant also failed to show that the State would not have withdrawn the offer and failed to show that the trial court would have accepted the plea agree-

ment. *Maraschiello v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 780 (Tenn. Crim. App. Dec. 4, 2020).

Defendant failed to show prejudice as a result of trial counsel's failure to call witnesses at trial to support a heat of passion defense because defendant failed to show that counsel was even aware of the existence of the witnesses. Moreover, the proof at trial overwhelmingly established premeditation, so it would have been both irrational and unreasonable for trial counsel to have pursued a theory that the murder of the victim was voluntary manslaughter. *Maraschiello v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 780 (Tenn. Crim. App. Dec. 4, 2020).

Petitioner failed to show that he was prejudiced by counsel's failure to ensure that petitioner understood the consequences of his guilty plea because he had the opportunity to converse with three attorneys over two days, he was familiar with the criminal justice system, and petitioner decided to plead guilty so he did not have to spend any more time in jail. *Wadri v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 797 (Tenn. Crim. App. Dec. 15, 2020).

Even though counsel was deficient for failing to advise petitioner of possible immigration consequences of his guilty plea, petitioner was not prejudiced, and therefore he was properly denied postconviction relief, because the record was clear that he was aware of the possibilities and chose to plead guilty anyway, as another attorney had advised him of the possible consequences. *Wadri v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 797 (Tenn. Crim. App. Dec. 15, 2020).

Defendant failed to establish that defendant's trial counsel provided ineffective assistance of counsel or that defendant's guilty plea was involuntarily and unknowingly entered as a result. The post-conviction court accredited trial counsel's testimony and found that counsel adequately investigated defendant's case and prepared for defendant trial and that defendant understood the consequences of entering a guilty plea and that defendant did so in defendant's best interest. *Hunter v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 799 (Tenn. Crim. App. Dec. 17, 2020).

Trial counsel's performance was not deficient for failing to renew the motion to sever petitioner's trial from the co-defendant's trial because State admitted the co-defendant's redacted statement to police to prove that he was present at the time of the victim's fatal injuries, his redacted statement as presented to the jury did not directly refer to petitioner, and neither co-defendant admitted to witnessing the other co-defendant inflict the fatal injuries on the victim. *Metz v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 7 (Tenn. Crim. App. Jan. 7, 2021).

Petitioner was not entitled to post-conviction relief, given that his claim of ineffective assistance failed; because one witness did not testify at the post-conviction hearing, petitioner could not show prejudice from counsel's decision not to call the witness, as the court could not speculate about whether the witness's testimony would have affected the outcome of the trial. *Bland v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 36 (Tenn. Crim. App. Jan. 29, 2021).

Petitioner was not entitled to post-conviction relief, given that his claim of ineffective assistance failed; counsel decided not to call one witness because he felt the witness would not support his defensive theory and the court would not second guess counsel's reasonable trial strategy. *Bland v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 36 (Tenn. Crim. App. Jan. 29, 2021).

Petitioner was not entitled to post-conviction relief, given that his claim of ineffective assistance failed; counsel asked the trial court to instruct the jury that one man was petitioner's accomplice, but the trial court found that the jury should make that determination and the court affirmed that decision on direct appeal. Counsel chose a reasonable strategy that the court refused to second-guess. *Bland v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 36 (Tenn. Crim. App. Jan. 29, 2021).

Petitioner failed to show that trial counsel was ineffective for failing to withdraw as counsel after it became apparent that the public defender's office had also represented a victim in an unrelated case because petitioner acknowledged that a pretrial motion to withdraw was filed and a hearing was held before his trial, petitioner did not allege that an earlier filing would have persuaded the trial court to find a conflict existed, and trial counsel testified that another assistant public defender represented the victim in an unrelated case and never discussed the victim with petitioner's defense team. *Burgess v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 87 (Tenn. Crim. App. Mar. 11, 2021).

Petitioner failed to show that trial counsel was ineffective for failing to argue diminished capacity because the limited testimony from the expert did not reflect that he would have testified at trial that petitioner was suffering from diminished capacity such that he was unable to form premeditation. In addition, petitioner admitted that he did not experience the symptoms at the time of the shooting, and trial counsel stated petitioner was "dead set" on arguing self-defense. *Burgess v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 87 (Tenn. Crim. App. Mar. 11, 2021).

Petitioner failed to show that his trial counsel was ineffective for failing to file a motion to dismiss or object to the State's not having collected the beer bottle fragments because

petitioner acknowledged that a witness swept up and disposed of the fragments and trial counsel could do nothing to retrieve them, and trial counsel testified that the crime scene photographs documented the bottle's presence and they were able to use it to corroborate petitioner's version of events. *Burgess v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 87 (Tenn. Crim. App. Mar. 11, 2021).

Petitioner failed to show that trial counsel was ineffective for advising him not to testify because trial counsel testified that petitioner gave inconsistent versions of the relevant events and changed his story in response to cross-examination-style questions, and petitioner testified that he decided not to testify voluntarily. *Burgess v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 87 (Tenn. Crim. App. Mar. 11, 2021).

Petitioner failed to show that his trial counsel was ineffective for failing to impeach his co-defendant's testimony because at the post-conviction hearing petitioner never questioned counsel about his failure to ask the co-defendant about his criminal record and the only proof presented about the co-defendant's record was petitioner's vague and uncorroborated testimony that he had recently been convicted of vehicular homicide. *Savage v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 108 (Tenn. Crim. App. Mar. 24, 2021).

Petitioner failed to show that his trial counsel was ineffective for failing to call his co-defendant's girlfriend as a defense witness because he failed to show that her statements about the co-defendant's statements about beating the victim would have been admissible as the testimony was hearsay for which no exception applied. *Savage v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 108 (Tenn. Crim. App. Mar. 24, 2021).

Petitioner failed to show that his trial counsel was ineffective for failing to object to the admission of the nightstick at trial because a special agent testified that she was unable to find petitioner's DNA on the nightstick, and it was found at the co-defendant's home, which supported the defense theory that petitioner was not the person who beat the victim with the nightstick. *Savage v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 108 (Tenn. Crim. App. Mar. 24, 2021).

Petitioner failed to show that his trial counsel was ineffective for announcing petitioner's guilty pleas to four counts in the presence of the jury at the beginning of the trial, and therefore he was properly denied postconviction relief, because the strategy supported the defense theory that while petitioner burglarized the victim's home he did not bind her hands and feet and did not beat her. The record showed that petitioner was fully advised of the strategy and approved it. *Savage v. State*, — S.W.3d —,

2021 Tenn. Crim. App. LEXIS 108 (Tenn. Crim. App. Mar. 24, 2021).

Petitioner failed to show that his counsel was ineffective for failing to explain to petitioner that he was being sentenced outside the range for second-degree murder because the record clearly showed that petitioner was informed about his sentence prior to the entry of his guilty pleas. Counsel testified she explained the sentence to petitioner, the plea hearing transcript confirmed that the trial court explained the sentence to petitioner, and the plea petition he signed stated that he agreed to plead outside his sentencing range. *Small v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 124 (Tenn. Crim. App. Mar. 31, 2021).

Petitioner failed to prove that his counsel was ineffective for failing to adequately prepare him to testify because it was clear from the record that petitioner was fully informed on more than one occasion of the dangers of testifying and claiming he would never hurt anyone, and despite these warnings and without prompting from either trial counsel or the State, petitioner voluntarily opened the door to being impeached with his prior conviction for reckless aggravated assault. *Eggleston v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 152 (Tenn. Crim. App. Apr. 15, 2021).

16. — —Effective Assistance Denied.

Counsel was ineffective for failing to preserve the certified question regarding the inmate's motion to suppress where the judgment of conviction contained a comment in which it stated that the inmate reserved the right to appeal the motion to suppress, but there was no certified question articulated by the inmate or entered by the trial court. *Milam v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 731 (Tenn. Crim. App. Nov. 17, 2020).

Petitioner was prejudiced by trial counsel's deficient performance in failing to procure petitioner's mental health records because the evidence against her was not overwhelming and her mental health evidence, which included that following the victim's death she was involuntarily committed for a suicide attempt and diagnosed with several mental disorders would have answered serious questions regarding her demeanor, which counsel had noted himself. *Metz v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 7 (Tenn. Crim. App. Jan. 7, 2021).

Petitioner was prejudiced by trial counsel's deficient performance in failing to call four known character witnesses to testify at trial that until petitioner moved to Tennessee four weeks before the victim's death, she was still the loving, nurturing mother they had always known, because the evidence against petitioner was not overwhelming and significant evidence of her long history of good character as a loving, nurturing, attentive mother had a reasonable

probability of changing the outcome. *Metz v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 7 (Tenn. Crim. App. Jan. 7, 2021).

Even though trial counsel's performance was deficient for failing to investigate the co-defendant's military records, as counsel had ample evidence that the co-defendant had mental health issues warranting investigation, petitioner was not prejudiced by the absence of evidence of the co-defendant's mental health issues as revealed in those records because it would not have affected the State's theory that petitioner was culpable for the victim's death under the theory of criminal responsibility. *Metz v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 7 (Tenn. Crim. App. Jan. 7, 2021).

Even though trial counsel's performance was deficient for failing to investigate the co-defendant's military records concerning a rape and murder trial, as counsel had ample evidence that the co-defendant had mental health issues warranting investigation, petitioner was not prejudiced because the co-defendant's statement to police as admitted at trial was similar enough in content to the detective's prior sworn testimony that the absence of the prior sworn testimony did not prejudice petitioner. *Metz v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 7 (Tenn. Crim. App. Jan. 7, 2021).

20. —Waiver.

Trial court erred in requiring defendant to proceed pro se at trial because defendant did not implicitly waive the right to counsel and the trial court erred in determining that defendant forfeited the right to counsel. Given the calamity of errors that permeated the proceedings, remand for a new trial was necessary due to the trial court's errors in the procedure it employed to find that defendant forfeited the right to counsel and in requiring defendant to proceed pro se at trial. *State v. Toomes*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 700 (Tenn. Crim. App. Oct. 29, 2020).

21. —Forfeiture.

Trial court erred in requiring defendant to proceed pro se at trial because the trial court erred in determining that defendant forfeited the right to counsel without properly holding an evidentiary hearing. Given the calamity of errors that permeated the proceedings, remand for a new trial was necessary due to the trial court's errors in the procedure that the court employed to find that defendant forfeited the right to counsel and in requiring defendant to proceed pro se at trial. *State v. Toomes*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 700 (Tenn. Crim. App. Oct. 29, 2020).

28. —Self-Representation.

Trial court did not abuse its discretion by denying defendant's attempt to waive his right to counsel and demand to proceed pro se because the request was not timely, as defen-

dant's demand did not occur until after the close of the State's case-in-chief, the trial court found that defendant's focus was on delaying and disrupting the process, and defendant indicated he needed help understanding the rules of court. *State v. Greer*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 565 (Tenn. Crim. App. Aug. 17, 2020).

29. Right to Demand Nature and Cause of Accusation.

33. —Notice of Offense Sufficient.

Indictment was sufficient to inform defendant of the nature of the charge of tampering with the firearm he used during a shooting because the indictment informed defendant that he was accused of altering, destroying, or concealing any record, document, or thing with the intent to impair its verity, legibility, or availability as evidence in an investigation that he knew was taking place, and the indictment cited to subsection (a)(1). *State v. Manning*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 615 (Tenn. Crim. App. Sept. 17, 2020).

Defendant's indictment for attempted first-degree murder was sufficient to permit him to be tried on that charge because the indictment necessarily implied the attempted homicide was intentional as the element of premeditation required a previously formed design or intent to kill; the indictment clearly stated that the alleged offense occurred with premeditation and was a Class A felony; and the only attempted homicide offense that had an element of premeditation and was a Class A felony was attempted first-degree murder. *State v. Robinson*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 96 (Tenn. Crim. App. Mar. 17, 2021).

39. Right to Be Informed of Constitutional Rights.

Trial court erred in denying defendant's motion to suppress the statement which defendant gave prior to defendant's arrest to responding police officers because defendant was not advised of defendant's Miranda rights in that defendant was in custody as defendant was in handcuffs and in the back of a police car when defendant made the statement and an officer never articulated to defendant that defendant was being handcuffed or placed in the car for safety reasons. However, the error was harmless given the evidence of defendant's guilt. *State v. Moran*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 701 (Tenn. Crim. App. Oct. 29, 2020).

40. Right to Meet Witnesses Face to Face.

Trial court did not violate defendant's rights under the Confrontation Clause because the record established that defendant was able to question and alert the jury as to co-defendant's motivation for testifying, asking her why she was testifying for the State and whether she

received the promise of leniency in exchange for her testimony. *State v. Nunez*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 559 (Tenn. Crim. App. Aug. 14, 2020).

Trial court did not err in failing to grant a mistrial based on a violation of defendant's constitutional right of confrontation when a detective testified about co-defendant's identification of defendant as the detective's testimony did not constitute a significant portion of the evidence of guilt because there was ample evidence identifying defendant's involvement in the crimes absent the detective's mention of co-defendant's identification of defendant as the victim identified defendant in a photograph and testified at trial with certainty about the identification; and one witness to the carjacking and robbery identified defendant as a participant. *State v. Harris*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 59 (Tenn. Crim. App. Feb. 23, 2021).

59. —Impeachment.

Trial court did not unreasonably restrict defendant's right to cross-examine a former police officer, who was fired from his employment for having sent and/or received inappropriate text messages with a confidential informant, because the evidence surrounding his termination was not relevant in that it made any fact in evidence that was of consequence more probable or less probable; and there was no evidence that the text messages were concealed or that the officer made false statements or lied about the messages. *State v. Robinson*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 96 (Tenn. Crim. App. Mar. 17, 2021).

64. Right to Compulsory Process.

Post-conviction court did not abuse its discretion and violate defendant's right to compulsory process by excluding most of defendant's proposed witnesses from testifying at the post-conviction hearing because the court properly determined that most of the proposed witnesses were either cumulative or irrelevant. Although many of the witnesses would have testified regarding defendant's mental problems and/or the victim's mental problems, proof on both of these issues was presented to the jury. *Marschiello v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 780 (Tenn. Crim. App. Dec. 4, 2020).

65. Right to Speedy Trial.

Defendant's right to a speedy trial was not violated by the three and one-half year delay because the delay was not inordinately long, the reason was a legitimate one and not part of a plan by the State to prejudice defendant, defendant did not assert the right until he filed his motion to dismiss, and there was no prejudice to defendant as a result of the delay. *State v. Golden*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 692 (Tenn. Crim. App. Oct. 23, 2020).

There was no speedy trial violation because the thirteen-month delay did not impair the defense, and based on the nature of the charges against defendant and the numerous witnesses involved at trial, the case was sufficiently complex that any delay was not unreasonable. *State v. Moon*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 55 (Tenn. Crim. App. Feb. 14, 2021).

Because defendant failed to establish prejudice from the more than two-year delay in this case between his arrest and his pleading guilty, the trial court did not err by denying his motion to dismiss and his right to a speedy trial was not violated; the delay, which was twice as long as the maximum sentence that could be imposed, weighed against the State, but defendant could not identify any prejudice to his ability to present a defense and the record did not suggest that the presence of the unresolved charges disadvantaged him. *State v. Boykin*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 74 (Tenn. Crim. App. Mar. 4, 2021).

70. Trial by Impartial Jury.

74. —Jury Instructions.

Through its improper instruction to prospective jurors that contrary to pro se defendant's claim during voir dire, defendant's counsel was not fired yesterday but was allowed to withdraw from representation due to what counsel and the court believed was defendant's refusal to cooperate with counsel in preparing a defense, not only did the court inform the prospective jurors that defendant lied to them, but provided the jury with its personal impression of defendant and essentially allowed the jury to consider inadmissible character evidence. *State v. Toomes*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 700 (Tenn. Crim. App. Oct. 29, 2020).

88. —Exclusion of Juror.

Petitioner testified he recalled hearing a juror claim they belonged to the same gym as the prosecutor, but petitioner failed to present any proof during the post-conviction hearing as to which juror he was referring or how he was prejudiced; ineffective assistance was not shown for failing to challenge the juror and petitioner was not entitled to relief. *Delosh v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 631 (Tenn. Crim. App. Sept. 23, 2020).

96. —Appellate Review.

Defendant did not establish by convincing evidence that the trial court abused its discretion in not excusing a juror for cause due to her views on the death penalty because the trial court found that the juror's responses indicated that the prior capital jury on which she served "considered all options" before imposing a sentence of life without parole and the trial court found that the juror was qualified to serve because she indicated she would fairly consider

all sentencing options. *State v. Miller*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 624 (Tenn. Crim. App. Sept. 18, 2020).

Although the trial court unreasonably restricted defense counsel's questioning of prospective jurors, any error in doing so was harmless beyond a reasonable doubt because defendant made no attempt to argue or establish prejudice; the trial court permitted defense counsel to rephrase the question without explicit reference to the confession in defendant's case, but defense counsel abandoned any further questioning on that issue; there was no evidence that defendant exercised or exhausted her peremptory challenges; and the record otherwise showed that the jury as sworn was fair and impartial. *State v. Gore*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 736 (Tenn. Crim. App. Nov. 18, 2020).

100. Venue.

In a case involving five defendants who were convicted of forgery and fraudulent filing of a lien, the trial court did not abuse its discretion in denying a motion to change venue filed by one of the defendants. The moving defendant failed to show prejudice or bias or point to any actual place in the record where he was referred to as a sovereign citizen. *State v. Lyons*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 100 (Tenn. Crim. App. Mar. 22, 2021).

105. Right Against Self-Incrimination.

107. —Confessions.

Trial court did not err by denying defendant's motion to suppress because the record sup-

ported its conclusion that defendant's statement was voluntarily given and not the product of police coercion or promises of leniency, as he arrived at the police station of his own volition and was permitted to leave, the interview only lasted an hour and half, and neither the detective nor the Department of Children's Services employee threatened defendant or promised him leniency in exchange for his confession. *State v. Wyse*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 687 (Tenn. Crim. App. Oct. 20, 2020).

111. —*Miranda*.

Petitioner was sitting on the couch in his home when he spoke with police and gave the non-inculpatory statement that was used at trial, plus he testified at trial that at the time he spoke with police, he did not think police had an arrest warrant or probable cause to arrest him; he did not show that he was subjected to custodial interrogation requiring the police to advise him of his *Miranda* rights and his claim for post-conviction relief was properly denied. *McKaughan v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 21 (Tenn. Crim. App. Jan. 13, 2021).

119.5 —Prosecutor's Comments.

Petitioner failed to show that his trial counsel was ineffective for failing to object to the State's repeated comments about his postarrest silence because the overwhelming majority, if not all, of the State's questions and comments were aimed at petitioner's prearrest silence. *Hall v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 817 (Tenn. Crim. App. Feb. 09, 2021).

Sec. 10. Double jeopardy prohibited.

NOTES TO DECISIONS

ANALYSIS

1. Application and Scope of Provision.
30. No Double Jeopardy Violation.

1. Application and Scope of Provision.

Initial proceeding filed by the county in general sessions court for a fine upon the citizen for allegedly violating a city ordinance was criminal rather than civil in that it sought punishment to vindicate public justice and therefore constituted jeopardy under the Double Jeopardy Clause; citizen could not again be tried for the same offense in a state trial court of general jurisdiction over her timely objection, and the county could not have another trial de novo in the circuit court for the same offense. *Metro.*

Gov't of Nashville v. Dreher, — S.W.3d —, 2021 Tenn. App. LEXIS 97 (Tenn. Ct. App. Mar. 12, 2021).

30. No Double Jeopardy Violation.

Because the Money Laundering Act of 1996 specifically directed that money laundering offenses should be separately punished from any related specified unlawful activity, the General Assembly's intent to permit multiple punishments was clear; thus, defendant's conviction of both offenses - the January 9 delivery of marijuana and the January 13 promotional money laundering - did not violate double jeopardy protections. *State v. Allison*, — S.W.3d —, 2021 Tenn. LEXIS 3 (Tenn. Jan. 14, 2021).

Sec. 23. Right of assembly.**NOTES TO DECISIONS****4. Application to Governmental Agencies.**

In light of the absence of a clear right of a citizen to have the citizen's petition of remonstrance heard and no clear duty on the part of the Tennessee General Assembly to hear the petition, the trial court acted within its discre-

tion in denying the citizen's petition for a writ of mandamus requesting that the legislative chambers be ordered to hear and consider the citizen's petition of remonstrance. *Gentry v. Casada*, — S.W.3d —, 2020 Tenn. App. LEXIS 416 (Tenn. Ct. App. Sept. 17, 2020).

ARTICLE II**DISTRIBUTION OF POWERS****Sec. 1. Division of powers.****NOTES TO DECISIONS****5. Preservation of Departmental Lines.**

Appellant was not entitled to a writ of mandamus to order officials in the Tennessee General Assembly to present an accurate version of the Tennessee Constitution to the public when the Tennessee Constitution on the General Assembly website contained a typographical error

because the officials had no duty to display the Tennessee Constitution and the court had no authority to order the officials to correct the version posted voluntarily on the General Assembly website. *Gentry v. Casada*, — S.W.3d —, 2020 Tenn. App. LEXIS 416 (Tenn. Ct. App. Sept. 17, 2020).

Sec. 2. Limitation of powers.**NOTES TO DECISIONS****3. Extent of Legislative Powers.**

Appellant was not entitled to a writ of mandamus to order officials in the Tennessee General Assembly to present an accurate version of the Tennessee Constitution to the public when the Tennessee Constitution on the General Assembly website contained a typographical error

because the officials had no duty to display the Tennessee Constitution and the court had no authority to order the officials to correct the version posted voluntarily on the General Assembly website. *Gentry v. Casada*, — S.W.3d —, 2020 Tenn. App. LEXIS 416 (Tenn. Ct. App. Sept. 17, 2020).

LEGISLATIVE DEPARTMENT**Sec. 12. Each house to make its own rules.****NOTES TO DECISIONS****ANALYSIS**

3. Legislative Meetings.
4. Website.

3. Legislative Meetings.

In light of the absence of a clear right of a citizen to have the citizen's petition of remonstrance heard and no clear duty on the part of the Tennessee General Assembly to hear the petition, the trial court acted within its discretion in denying the citizen's petition for a writ of mandamus requesting that the legislative

chambers be ordered to hear and consider the citizen's petition of remonstrance. *Gentry v. Casada*, — S.W.3d —, 2020 Tenn. App. LEXIS 416 (Tenn. Ct. App. Sept. 17, 2020).

4. Website.

Appellant was not entitled to a writ of mandamus to order officials in the Tennessee General Assembly to present an accurate version of the Tennessee Constitution to the public when the Tennessee Constitution on the General Assembly website contained a typographical error because the officials had no duty to display the

Tennessee Constitution and the court had no authority to order the officials to correct the version posted voluntarily on the General As-

sembly website. *Gentry v. Casada*, — S.W.3d —, 2020 Tenn. App. LEXIS 416 (Tenn. Ct. App. Sept. 17, 2020).

Sec. 28. Taxable property — Valuation — Rates.

Attorney General Opinions. Proposed Senate Bill 2453, 111th Gen. Assem. (2020), as amended, would add the following sentence to Tenn. Code Ann. § 67-5-1509(a): "Except as provided in § 67-5-1302, real property assessments that are under appeal are not eligible for equalization." The proposed amendment is constitutionally problematic because of its effect on appeals for non-reappraisal years. While locally assessed real property is not generally entitled to equalization, the proposed amendment could result in violation of the uniformity require-

ment of article II, section 28, of the Tennessee Constitution because it would prevent equalization through application of the county's appraisal ratio to all locally assessed real property under appeal. Since the value of property under appeal will be determined as of the year being appealed, the appraisal ratio for that county must be applied to values determined for non-reappraisal years to bring them in line with other real property in the county. OAG 20-10, 2020 Tenn. AG LEXIS 15 (5/20/2020).

ARTICLE IV ELECTIONS

Sec. 1. Right to vote — Election precincts — Military duty.

NOTES TO DECISIONS

13. Election Laws.

Registered voters without special vulnerability to COVID-19 were unlikely to succeed on their claims that the State's construction of T.C.A. § 2-6-201(5)(C) and (D) violated Tenn. Const. art. 1, § 5, where the burden on the right to vote was moderate given that the risk for in-person voting was significantly less than

for those vulnerable to the virus, and when weighed against the State's interests in voter fraud prevention, fiscal responsibility, and feasibility, the moderate burden placed on the right to vote was justified. *Fisher v. Hargett*, 604 S.W.3d 381, 2020 Tenn. LEXIS 283 (Tenn. Aug. 5, 2020).

ARTICLE VI JUDICIAL DEPARTMENT

Sec. 9. Judge's charge.

NOTES TO DECISIONS

18. Comments on Evidence.

Defendants were not entitled to relief on the issue regarding their claim that the trial court improperly commented on the evidence by separating multi-page exhibits and placing them in manila folders. The trial court's actions

merely tried to organize the 103 exhibits containing approximately 1500 pages of information, and in doing so, the trial court did not even remotely comment on the evidence. *State v. Lyons*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 100 (Tenn. Crim. App. Mar. 22, 2021).

Sec. 11. Incompetency of judges — Special judges.**NOTES TO DECISIONS****ANALYSIS**

- 6. Interest in Case.
- 7. Prior Service as Counsel.
- 23. Insufficient Grounds.

6. Interest in Case.

Denial of defendant's motion for recusal of the trial judge was appropriate because defendant failed to establish that the judge, as a former deputy district attorney general, participated in the case in any way that was personal or substantial such that the judge's impartiality reasonably might have been questioned, despite the judge's campaign letter stating that the judge supervised all criminal prosecutions in the county. A person of ordinary prudence would have had no reasonable basis to question the judge's impartiality in the case. *State v. Styles*, — S.W.3d —, 2020 Tenn. LEXIS 478 (Tenn. Oct. 30, 2020).

7. Prior Service as Counsel.

Denial of a motion to recuse a trial judge who served as a deputy district attorney general in the county when defendants were indicted by a

grand jury was appropriate because a person of ordinary prudence would not have found a reasonable basis for questioning the judge's impartiality. Further, a reasonable person would have been hard-pressed to believe that the judge's former participation as a deputy district attorney general in all the new criminal cases in the county in a year was personal and substantial. *State v. Griffin*, — S.W.3d —, 2020 Tenn. LEXIS 479 (Tenn. Oct. 30, 2020).

23. Insufficient Grounds.

Although a husband alleged that the judge had to be recused in a divorce action because the husband claimed that the judge could not remain impartial when the husband was accused of soliciting the murder of a judicial colleague, the judge did not have a duty to recuse in the case because there were no facts alleged or shown in the record either that demonstrated actual bias on the part of the judge, or that would have led a well-informed, disinterested observer to question the impartiality of the judge in the case. *Montgomery v. Montgomery*, — S.W.3d —, 2020 Tenn. App. LEXIS 488 (Tenn. Ct. App. Nov. 2, 2020).

ARTICLE XI**MISCELLANEOUS PROVISIONS****Sec. 8. General laws only to be passed.**

Attorney General Opinions. HB 2919/SB 2925, 111th Tenn. Gen. Assem. (2020), which is intended to exempt the city of Athens from the operation of TCA § 67-4-1425(a) by means of a narrow population bracket, raises constitutional concerns. Both article I, section 8 and article XI, section 8 of the Tennessee Constitution require that a population bracket designed to exempt a particular county or municipality

from a tax law be supported by some rational basis related directly to the size of the bracketed population. Because there does not appear to be such a rational basis for creating a narrow population-bracket exception from TCA § 67-4-1425 for the city of Athens, the proposed legislation raises significant constitutional concerns. OAG 20-12, 2020 Tenn. AG LEXIS 16 (6/12/2020).

Sec. 9. Power over local affairs — Home rule for cities and counties — Consolidation of functions.**NOTES TO DECISIONS****26. Home Rule.**

For Tenn. Const. art. XI, § 9 to apply, the Education Savings Account Pilot Program (ESA Act) must be applicable to a particular county or municipality either in its governmental or proprietary capacity; given that the purpose of the constitution is to give local control over local legislation, and the ESA Act is local in effect and is applicable to Davidson and

Shelby counties in their governmental capacities, whether the Act also affects or primarily affects private rights is irrelevant. *Metro. Gov't of Nashville v. Tenn. Dep't of Educ.*, — S.W.3d —, 2020 Tenn. App. LEXIS 434 (Tenn. Ct. App. Sept. 29, 2020).

Tennessee Education Savings Account Pilot Program (ESA Act) is (1) local in effect, and (2) applicable to Davidson and Shelby counties (3)

in their governmental capacity; it follows that Tenn. Const. art. XI, § 9, paragraph 2 applies to Davidson and Shelby counties and that the ESA Act is unconstitutional as applied to them due to the lack of the required referendums or

votes of the county commissions. Metro. Gov't of Nashville v. Tenn. Dep't of Educ., — S.W.3d —, 2020 Tenn. App. LEXIS 434 (Tenn. Ct. App. Sept. 29, 2020).

Sec. 12. Education's inherent value — Public schools — Support of higher education.

NOTES TO DECISIONS

7. Scope of section.

Plenary authority derived from Tenn. Const. art. XI, § 12 relates to public schools, not private ones; when encouraging, assisting or benefiting private schools, the General Assembly is operating outside that plenary power, and

having plenary authority over public schools does not mean that other provisions of the Tennessee Constitution do not or cannot apply. Metro. Gov't of Nashville v. Tenn. Dep't of Educ., — S.W.3d —, 2020 Tenn. App. LEXIS 434 (Tenn. Ct. App. Sept. 29, 2020).

TITLE 1
CODE AND STATUTES
CHAPTER 3
CONSTRUCTION OF STATUTES

1-3-105. Definition of terms used in code.

NOTES TO DECISIONS

1. Application of Definitions.

Trial court properly dismissed a county's complaint to enforce its zoning ordinance as applied to a commercial wedding event venue operated in a rural residential area because the venue was engaged in the commercial production of farm products and nursery stock within the meaning of the applicable statutes; the use of the property was in keeping with the legislature's obvious intent to allow the necessary

supplementation of farming income with income from related activities as long as such activities were secondary to the commercial production of farm products and nursery stock. because the property owner testified that the event venue was successful due to the aesthetic appearance of the farm and the farming operation itself. *Jefferson Cty. v. Wilmoth Family Props., LLC*, — S.W.3d —, 2021 Tenn. App. LEXIS 37 (Tenn. Ct. App. Feb. 2, 2021).

TITLE 2
ELECTIONS

CHAPTER.

7. PROCEDURE AT THE POLLING PLACE.

CHAPTER 6
ABSENTEE VOTING

PART 2 ABSENTEE VOTING

2-6-201. Methods of voting absentee.

NOTES TO DECISIONS

1. Constitutionality.

Registered voters without special vulnerability to COVID-19 were unlikely to succeed on their claims that the State's construction of T.C.A. § 2-6-201(5)(C) and (D) violated Tenn. Const. art. 1, § 5, where the burden on the right to vote was moderate given that the risk for in-person voting was significantly less than

for those vulnerable to the virus, and when weighed against the State's interests in voter fraud prevention, fiscal responsibility, and feasibility, the moderate burden placed on the right to vote was justified. *Fisher v. Hargett*, 604 S.W.3d 381, 2020 Tenn. LEXIS 283 (Tenn. Aug. 5, 2020).

CHAPTER 7

PROCEDURE AT THE POLLING PLACE

SECTION.

2-7-143. Tennessee Freedom of Speech Act.
[Effective until July 1, 2021. See
the version effective on July 1,
2021.]

SECTION.

2-7-143. Tennessee Freedom of Speech Act.
[Effective on July 1, 2021. See
the version effective until July
1, 2021.]

2-7-143. Tennessee Freedom of Speech Act. [Effective until July 1, 2021. See the version effective on July 1, 2021.]

(a) This section shall be known and may be cited as the “Tennessee Freedom of Speech Act.”

(b) Notwithstanding any law to the contrary, during the period beginning sixty (60) days before a general election until the day after the next subsequent general election:

(1) This state, a local government, or any other political subdivision of this state:

(A) Shall not regulate the shape or quantity of political or campaign posters or signs placed on private property that is located more than one hundred feet (100') from a polling place if the signs or posters are placed on the property by the owner of the property or any lawful resident of a residence on the property;

(B) May prohibit, notwithstanding subdivision (b)(1)(A), any political or campaign poster or sign covered by this section from exceeding:

(i) For commercial property, thirty-two square feet (32 sq. ft.) in size; and

(ii) For residential property, sixteen square feet (16 sq. ft.) in size; and

(C) Notwithstanding subdivision (b)(1)(A), may adopt reasonable restrictions limiting the number of political campaign signs or posters that may be placed on property; provided, that such restrictions authorize an owner or resident to place at least one (1) poster or sign on the property per candidate, issue, or subject; and

(2) A homeowners' association shall not, by covenant, condition, restriction, or rule, prohibit the display of political or campaign posters or signs placed on private property by the owner of the property or any lawful resident of a residence on the property. A homeowners' association may adopt reasonable covenants, conditions, restrictions, or rules with respect to the placement of political or campaign posters or signs placed on homeowner association common space and private property maintained by the owner or resident, including limiting the size of campaign posters or signs in those common and private property areas to four square feet (4 sq. ft.).

(c) A lessor of residential property may require a lessee to obtain the written permission of the lessor prior to placing any political or campaign posters or signs on such residential property. Any such requirement must be included in the lease or rental agreement.

(d) This section applies to any clause, covenant, condition, restriction, or rule contained in any agreement or contract between a homeowners' associa-

tion and property owner or between a lessor and lessee executed or modified after July 1, 2017.

History.

Acts 2017, ch. 294, § 1.

of Acts 2017, ch. 294, § 2 was added as subsection (d) by authority of the Code Commission.

Code Commission Notes. In 2020, the text

2-7-143. Tennessee Freedom of Speech Act. [Effective on July 1, 2021. See the version effective until July 1, 2021.]

(a) This section shall be known and may be cited as the “Tennessee Freedom of Speech Act.”

(b) Notwithstanding any law to the contrary, during the period beginning sixty (60) days before a election until the day after the next subsequent election:

(1) This state, a local government, or any other political subdivision of this state:

(A) Shall not regulate the shape or quantity of political or campaign posters or signs placed on private property that is located more than one hundred feet (100') from a polling place if the signs or posters are placed on the property by the owner of the property or any lawful resident of a residence on the property;

(B) May prohibit, notwithstanding subdivision (b)(1)(A), any political or campaign poster or sign covered by this section from exceeding:

(i) For commercial property, thirty-two square feet (32 sq. ft.) in size; and

(ii) For residential property, sixteen square feet (16 sq. ft.) in size; and

(C) Notwithstanding subdivision (b)(1)(A), may adopt reasonable restrictions limiting the number of political campaign signs or posters that may be placed on property; provided, that such restrictions authorize an owner or resident to place at least one (1) poster or sign on the property per candidate, issue, or subject; and

(2) A homeowners' association shall not, by covenant, condition, restriction, or rule, prohibit the display of political or campaign posters or signs placed on private property by the owner of the property or any lawful resident of a residence on the property. A homeowners' association may adopt reasonable covenants, conditions, restrictions, or rules with respect to the placement of political or campaign posters or signs placed on homeowner association common space and private property maintained by the owner or resident, including limiting the size of campaign posters or signs in those common and private property areas to four square feet (4 sq. ft.).

(c) A lessor of residential property may require a lessee to obtain the written permission of the lessor prior to placing any political or campaign posters or signs on such residential property. Any such requirement must be included in the lease or rental agreement.

(d) This section applies to any clause, covenant, condition, restriction, or rule contained in any agreement or contract between a homeowners' association and property owner or between a lessor and lessee executed or modified after July 1, 2017.

History.

Acts 2017, ch. 294, § 1; 2021, ch. 93, § 1.

of Acts 2017, ch. 294, § 2 was added as subsection (d) by authority of the Code Commission.

Code Commission Notes. In 2020, the text

TITLE 4

STATE GOVERNMENT

CHAPTER 4

ADMINISTRATION OF STATE DEPARTMENTS

4-4-105. Department office hours — Overtime.

NOTES TO DECISIONS

1. Holiday Compensation.

Trial court, on remand, properly granted a motion filed by the commissioner of the Department of General Services for summary judgment in a former employee's action for alleged unpaid holiday compensation because the suit against the commissioner in his official capacity

was actually a suit against his office, the Department proved the necessary statutory criteria, and the employee was not a state employee on the last scheduled workday immediately preceding the holiday at issue. *Arnold v. Oglesby*, — S.W.3d —, 2020 Tenn. App. LEXIS 344 (Tenn. Ct. App. July 30, 2020).

CHAPTER 5

UNIFORM ADMINISTRATIVE PROCEDURES ACT

PART 3 CONTESTED CASES

4-5-301. Conduct of contested cases.

NOTES TO DECISIONS

5. Authority of Administrative Law Judge.

Second administrative judge's order exceeded the scope of his authority because neither the Uniform Administrative Procedures Act nor the Tennessee Petroleum Underground Storage Tank Act gave an administrative judge the authority to limit a party's legal arguments to the Tennessee Underground Storage Tanks and Solid Waste Disposal Control Board; and,

by doing so, the judge's order infringed not only on the Tennessee Department of Environment and Conservation's statutory right to present a brief and an oral argument expressing its legal theories, but also on the Board's responsibility to review the initial order and render a final order. *Tenn. Dep't of Env't & Conservation v. Roberts*, — S.W.3d —, 2021 Tenn. App. LEXIS 43 (Tenn. Ct. App. Feb. 4, 2021).

4-5-312. Procedure at hearing.

NOTES TO DECISIONS

2. Contested Case Hearing.

In contrast to jury deliberations, which are private, when the matter involves a board's deliberations, which are open to public observation, the court find that the *Tenn. R. Evid.* 606(b) restrictions do not extend to this situation. *Tenn. Dep't of Health v. Collins*, — S.W.3d

—, 2020 Tenn. App. LEXIS 532 (Tenn. Ct. App. Nov. 25, 2020).

State claimed that extrinsic information introduced by a panel member during board deliberations prejudiced the State, as the specific documents referred to by the board member had not been introduced as evidence and were

not admissible to prove the standard of care; the court affirmed the decision of the trial court that reversed and remanded the board's final order, both because it was made upon unlawful procedure and was characterized by an abuse of

discretion or clearly unwarranted exercise of discretion. *Tenn. Dep't of Health v. Collins*, — S.W.3d —, 2020 Tenn. App. LEXIS 532 (Tenn. Ct. App. Nov. 25, 2020).

4-5-313. Rules of evidence — Affidavits — Official notice.

NOTES TO DECISIONS

4. Admissibility.

Exhibit indicated that there was a fact-finding hearing and identified the allegations against appellant, but the substance of the actual statements made to the supervisor were hearsay; the commissioner explained that she considered the fact that the supervisor took statements from additional witnesses as evidence that the city did not act arbitrarily in commencing the disciplinary proceedings and the commissioner did not abuse her discretion in admitting the exhibit for a limited purpose. *Washington v. City of Memphis Civil Serv. Comm'n*, — S.W.3d —, 2021 Tenn. App. LEXIS 48 (Tenn. Ct. App. Feb. 8, 2021).

Court rejected appellant's argument that his conduct would not constitute solicitation in violation of city disciplinary policies and uncorroborated hearsay was not the sole evidence of

appellant's wrongful acts. *Washington v. City of Memphis Civil Serv. Comm'n*, — S.W.3d —, 2021 Tenn. App. LEXIS 48 (Tenn. Ct. App. Feb. 8, 2021).

Appellant could not complain about the admission or consideration of an exhibit because he admitted it into evidence. *Washington v. City of Memphis Civil Serv. Comm'n*, — S.W.3d —, 2021 Tenn. App. LEXIS 48 (Tenn. Ct. App. Feb. 8, 2021).

Administrative judge properly excluded several email conversations containing statements as to the interpretation of the federal federal Deficit Reduction Act as they were irrelevant as to whether the reimbursement rules actually complied with T.C.A. § 71-5-108. *Dep't of Fin. & Admin. v. Chattanooga-Hamilton Cty. Hosp. Auth.*, — S.W.3d —, 2021 Tenn. App. LEXIS 82 (Tenn. Ct. App. Mar. 5, 2021).

4-5-322. Judicial review.

NOTES TO DECISIONS

ANALYSIS

14. Standard of Review.
18. Arbitrary or Capricious Agency Decision.
22. Agency Decision Upheld.
23. Agency Decision Reversed.

14. Standard of Review.

To the extent that the chancery court accepted the parties' agreement that the standard of review was a preponderance of the evidence standard, the circuit court erred, but reversal was not required because the substantial and material evidence standard of the statute had been interpreted as requiring less than a preponderance of the evidence. *Washington v. City of Memphis Civil Serv. Comm'n*, — S.W.3d —, 2021 Tenn. App. LEXIS 48 (Tenn. Ct. App. Feb. 8, 2021).

18. Arbitrary or Capricious Agency Decision.

Trial court properly reversed a civil service commission's decision to reinstate a police officer where the commission and court identified the appropriate program provisions that applied to the disciplinary proceeding, the expert

testimony supported a finding that the supplement the officer consumed was an immediate precursor to a controlled substance, the police officer tested positive for a controlled substance, and that positive drug test constituted a violation of the departmental policy that merited termination. Thus, the commission rendered an arbitrary and capricious decision by substituting its judgment for the rules and policies of the police department. *Metro. Gov't of Nashville & Davidson Cty. v. Civil Serv. Comm'n of the Metro. Gov't of Nashville & Davidson Cty.*, — S.W.3d —, 2020 Tenn. App. LEXIS 571 (Tenn. Ct. App. Dec. 16, 2020).

22. Agency Decision Upheld.

In a case in which appellant filed a grievance with the Electric Employees' Civil Service and Pension Board after the Nashville Electric Service revoked his unauthorized pay raise, the appellate court discerned no error in the trial court's order affirming the Board's decision against appellant. A manager acted outside the scope of his authority when he unilaterally implemented the pay raise for appellant without obtaining the necessary approvals of such raise. *Ramos v. Elec. Emples. Civ. Serv. & Pension Bd. of the Metro. Gov't of Nashville &*

Davidson Cty., — S.W.3d —, 2020 Tenn. App. LEXIS 595 (Tenn. Ct. App. Dec. 23, 2020).

Decision of the hearing officer as to attempted manipulation and unreasonable prevention of an assessment was supported by substantial and material evidence where intradepartmental review was not divorced from consideration of the manipulation issue, the hearing officer limited the child care center operator's pursuit of a reasonableness line of inquiry for the previous year because the specific proof the operator wanted to submit was deemed irrelevant, the officer exhibited a willfulness to hear any relevant evidence on the reasonableness issue, and the testimony and documentary evidence showed that the operator had attempted to manipulate the assessment. *Walker v. Tenn. Dep't of Human Servs.*, — S.W.3d —, 2021 Tenn. App. LEXIS 9 (Tenn. Ct. App. Jan. 13, 2021).

— S.W.3d —, 2021 Tenn. App. LEXIS 9 (Tenn. Ct. App. Jan. 13, 2021).

23. Agency Decision Reversed.

State claimed that extrinsic information introduced by a panel member during board deliberations prejudiced the State, as the specific documents referred to by the board member had not been introduced as evidence and were not admissible to prove the standard of care; the court affirmed the decision of the trial court that reversed and remanded the board's final order, both because it was made upon unlawful procedure and was characterized by an abuse of discretion or clearly unwarranted exercise of discretion. *Tenn. Dep't of Health v. Collins*, — S.W.3d —, 2020 Tenn. App. LEXIS 532 (Tenn. Ct. App. Nov. 25, 2020).

CHAPTER 21

HUMAN RIGHTS

PART 1 GENERAL PROVISIONS

4-21-101. Purpose and intent.

NOTES TO DECISIONS

11. Age Discrimination.

As the city produced evidence to show a non-discriminatory reason for the employee's termination, the presumption of discrimination dropped away and the employee had to prove pretext, which he failed to do; the trial court did not err in deciding not to infer discriminatory intent from a council member's isolated state-

ment and the evidence showed the city was concerned it could not afford salaries of employees with seniority. Argument that the desire to save money on salary costs was a proxy for age discrimination had been rejected by courts. *Wallace v. City of Lewisburg*, — S.W.3d —, 2020 Tenn. App. LEXIS 485 (Tenn. Ct. App. Oct. 30, 2020).

PART 3 VIOLATIONS—PROCEDURES

4-21-301. Discriminatory practices.

NOTES TO DECISIONS

3. Retaliation Generally.

Summary judgment was improper on the former employee's unlawful retaliation claim as she alleged that the employer altered her work schedule, and that the managers knowingly

allowed the harassment to continue by not stopping the supervisor from intimidating her. *Phelps v. State*, — S.W.3d —, 2021 Tenn. App. LEXIS 93 (Tenn. Ct. App. Mar. 10, 2021).

4-21-311. Additional remedies preserved — Civil Action — Allocations of Burden of Proof.

NOTES TO DECISIONS

6. Burden of Proof.

Plaintiffs, not the union, had the burden of proving intentional discrimination or retaliation. *Bailey v. U.S.F. Holland, Inc.*, — S.W.3d —, 2020 Tenn. App. LEXIS 422 (Tenn. Ct. App. Sept. 18, 2020).

tion. *Bailey v. U.S.F. Holland, Inc.*, — S.W.3d —, 2020 Tenn. App. LEXIS 422 (Tenn. Ct. App. Sept. 18, 2020).

PART 4 EMPLOYMENT-RELATED DISCRIMINATION

4-21-401. Employer practices.

NOTES TO DECISIONS

14. Hostile Environment Claims.

Summary judgment was improper on the former employee's Tennessee Human Rights Act discrimination and sexual harassment claims based on a hostile work environment because, even if the harassment occurred off-premises and after traditional work hours, the employee was sexually assaulted by a supervisor at an after-party that the employee testified

was a continuation of the employee-sponsored party, and which employees were pressured to attend; and there was a genuine dispute as to whether the employer knew that the supervisor had sexually abused women at work prior to the party. *Phelps v. State*, — S.W.3d —, 2021 Tenn. App. LEXIS 93 (Tenn. Ct. App. Mar. 10, 2021).

4-21-402. Labor organization practices.

NOTES TO DECISIONS

1. Burden of Proof.

While plaintiffs were part of a protected class due to their race and subjected to unwelcome harassment, they failed to show that the union's actions caused the employer to discriminate by having the offending employee reinstated; just because the offending employee's actions were reprehensible did not mean he was not entitled to union membership protection, plus the union's representation of him

through the grievance process did not result in his reinstatement, which was the result of a neutral committee's decision. *Bailey v. U.S.F. Holland, Inc.*, — S.W.3d —, 2020 Tenn. App. LEXIS 422 (Tenn. Ct. App. Sept. 18, 2020).

Plaintiffs, not the union, had the burden of proving intentional discrimination or retaliation. *Bailey v. U.S.F. Holland, Inc.*, — S.W.3d —, 2020 Tenn. App. LEXIS 422 (Tenn. Ct. App. Sept. 18, 2020).

TITLE 9**PUBLIC FINANCES**

CHAPTER.

8. BOARD OF CLAIMS.

Part 1 Establishment and Operation of
Board

CHAPTER 3

LOCAL GOVERNMENTS**PART 5 PUBLIC EMPLOYEE DEFINED BENEFIT FINANCIAL SECURITY ACT OF 2014****9-3-504. Political subdivisions to develop funding policies.**

NOTES TO DECISIONS

Amendment of Pension Plan.

City did not act illegally, arbitrarily, or capriciously in amending the city's pension plan because the plan was amended to comply with the Tennessee Public Employee Defined Benefit

Financial Security Act of 2014, T.C.A. § 9-3-501 et seq., and because the modifications were reasonable and necessary to preserve the actuarial integrity of the pension plan. Furthermore, there was no legal prohibition to amend-

ing the pension plan. *Cryer v. City of Dyersburg*, — S.W.3d —, 2021 Tenn. App. LEXIS 78 (Tenn. Ct. App. Mar. 3, 2021).

CHAPTER 8

BOARD OF CLAIMS

PART 1 ESTABLISHMENT AND OPERATION OF BOARD

SECTION.

9-8-109. Risk management fund.

PART 1 ESTABLISHMENT AND OPERATION OF BOARD

9-8-109. Risk management fund.

(a) A risk management fund shall be established as a separate account in the state treasury. Amounts remaining in the fund at the end of each fiscal year shall not revert to the general fund. Moneys in the risk management fund shall be invested by the state treasurer pursuant to chapter 4, part 6 of this title, for the sole benefit of that fund.

(b) The board of claims shall recommend annually to the commissioner of finance and administration the total occurrence basis funding required to satisfy the liabilities arising under this chapter, the liabilities arising under title 12, chapter 3, part 9 and the contribution required of each state department, agency and institution, including higher education, needed to achieve the required funding.

(c) The claims commission shall forward to the division of claims and risk management all of its decisions after they become final. The division of claims and risk management shall pay all claims for which the state is liable after the decision becomes final. Claim awards from the commission or the board of claims, as well as settlements, shall be paid only from funds appropriated or reserved for that purpose. There is hereby appropriated a sum sufficient to the risk management fund for the purpose of paying claims; provided, that awards made pursuant to actions founded upon express contract or breach thereof or awards made for the recovery of taxes shall not be paid from the risk management fund, but instead shall be paid from other funds in accordance with procedures established by the board of claims and approved by the commissioner of finance and administration.

(d) Expenses payable from the risk management fund shall include those attributable to: defending state employees pursuant to title 8, chapter 42, part 1; defending the state pursuant to part 3 of this chapter; the division of claims and risk management; the Tennessee claims commission; the department of the treasury's casualty risk program; and expenses and losses arising pursuant to title 12, chapter 3, part 9. The expenses pursuant to this subsection (d) are subject to annual appropriations and chapter 4, part 51 of this title. Subsequent to the close of each fiscal year, the attorney general and reporter shall provide to the state board of claims a report describing the manner in which funds received from the risk management fund were used in defending actions brought against the state and its employees.

History.

Acts 1984, ch. 972, § 17; 1985, ch. 105, § 17; 1995, ch. 260, § 1; 2003, ch. 212, §§ 1-3, 8; 2004, ch. 448, § 1; 2017, ch. 271, § 1.

This section is set out in this Advance Code Service to correct the reference at the end of (d) from “chapter 6 of this title” to “chapter 4, part 51 of this title”.

PART 4 DIVISION OF CLAIMS AND RISK MANAGEMENT**9-8-402. Claims.****NOTES TO DECISIONS****2. Statutes of Limitation.**

Dismissal of a spouse's loss of consortium claim by the Tennessee Claims Commission was appropriate because the spouse failed to comply with the statutory notice requirement when the spouse failed to file separate notice of the claim with the Tennessee Division of Claims Administration (DCA) within one year

of a motor vehicle accident. The lack of notice to the DCA was not cured by inclusion of the loss of consortium claim in the Tennessee Claims Commission complaint, which was filed within one year of the accident. *Kampmeyer v. State*, — S.W.3d —, 2020 Tenn. App. LEXIS 390 (Tenn. Ct. App. Aug. 28, 2020).

TITLE 10**PUBLIC LIBRARIES, ARCHIVES AND RECORDS****CHAPTER 7****PUBLIC RECORDS****PART 5 MISCELLANEOUS PROVISIONS****10-7-503. Records open to public inspection — Schedule of reasonable charges — Costs — Destruction of public records.****NOTES TO DECISIONS****11. Records Unavailable.**

In a case in which petitioner sought access to the audio recordings of his post-conviction hearing pursuant to the Tennessee Public Records Act, the judge properly denied his request because the recordings were made to aid the court reporter in generating the official transcript and the recordings constituted electronic records created as part of the court's judicial

process, the disclosure of which would frustrate or interfere with the judicial function of the court; and the record reflected that petitioner was provided with a copy of the official transcript that was certified by the trial court. *State ex rel. Wilson v. Gentry*, — S.W.3d —, 2020 Tenn. App. LEXIS 397 (Tenn. Ct. App. Sept. 2, 2020).

10-7-505. Denial of access — Procedures for obtaining access — Court orders — Injunctions — Appeals — Liability for nondisclosure.**NOTES TO DECISIONS****6. Petition Denied.**

In a case in which petitioner sought access to the audio recordings of his post-conviction hearing pursuant to the Tennessee Public Records Act, the judge properly denied his request because the recordings were made to aid the

court reporter in generating the official transcript and the recordings constituted electronic records created as part of the court's judicial process, the disclosure of which would frustrate or interfere with the judicial function of the court; and the record reflected that petitioner

was provided with a copy of the official transcript that was certified by the trial court. State ex rel. Wilson v. Gentry, — S.W.3d —, 2020 Tenn. App. LEXIS 397 (Tenn. Ct. App. Sept. 2, 2020).

TITLE 13
PUBLIC PLANNING AND HOUSING

CHAPTER.
7. ZONING.

Part 6 Short-Term Rental Unit Act

CHAPTER 7
ZONING

PART 6 SHORT-TERM RENTAL UNIT ACT

SECTION.
13-7-602. Part definitions.

PART 6 SHORT-TERM RENTAL UNIT ACT

13-7-602. Part definitions.

As used in this part:

- (1) “Effectively prohibit” means a local governing body acts or fails to act in a manner that prevents a property owner from using the owner’s property as a short-term rental unit after reasonable compliance with generally applicable local laws;
- (2) “Generally applicable local law” means an ordinance, resolution, regulation, rule, or other requirement of any type other than zoning enacted, maintained, or enforced by a local governing body that applies to all property or use of all property and does not apply only to property used as a short-term rental unit;
- (3) “Local governing body” means the legislative body of a city, municipality, county, or other political subdivision of this state that has authority to enact a zoning ordinance, resolution, regulation, rule, or other requirement of any type regarding land use in its jurisdiction;
- (4) “Prohibit” means to forbid or ban the operation of short-term rental units, either permanently or temporarily, within a local governing body’s jurisdiction, portion of the local governing body’s jurisdiction, or a portion of an owner’s property;
- (5) “Property” means a tract of land as recorded with the register of deeds office of the county where the property is located;

(6) “Provider” means any person engaged in renting a short-term rental unit and includes an owner of a residential unit that is made available through a vacation lodging service as that term is defined in § 62-13-104;

(7) “Residential dwelling” means a cabin, house, or structure used or designed to be used as an abode or home of a person, family, or household, and includes a single-family dwelling, a portion of a single-family dwelling, or an individual residential dwelling in a multi-dwelling building, such as an apartment building, condominium, cooperative, or timeshare;

(8) “Short-term rental unit” or “unit” means a residential dwelling that is rented wholly or partially for a fee for a period of less than thirty (30) continuous days and does not include a hotel as defined in § 68-14-302 or a bed and breakfast establishment or a bed and breakfast homestay as those terms are defined in § 68-14-502;

(9) “Transferred” means:

(A) An interest in real estate was conveyed on or after May 17, 2018; and

(B) The conveyance is exempt from the recordation tax pursuant to § 67-4-409(a)(3)(A)(i), (E), and (F); and

(10) “Used as a short-term rental unit” means the property was held out to the public for use as a short-term rental unit, and:

(A) For property that began being held out to the public for use as a short-term rental unit within the jurisdiction of a local governing body that required a permit to be issued or an application to be approved pursuant to an ordinance specifically governing short-term rental units prior to using the property as a short-term rental unit, a permit was issued or an application was approved by the local governing body for the property; or

(B) For property that began being held out to the public for use as a short-term rental unit within the jurisdiction of a local governing body that did not require a permit to be issued or an application to be approved pursuant to an ordinance specifically governing short-term rental units, the provider remitted taxes due on renting the unit pursuant to title 67, chapter 6, part 5 for filing periods that cover at least six (6) months within the twelve-month period immediately preceding the later of:

(i) May 17, 2018; or

(ii) The effective date of an ordinance, resolution, regulation, rule, or other requirement by a local governing body having jurisdiction over the property requiring a permit or an application to be approved pursuant to an ordinance specifically governing short-term rental units.

History.

Acts 2018, ch. 972, § 1; 2020, ch. 787, § 5.

Compiler’s Notes. This section is set out in the Advance Code Service to correct an error in

the 2020 cumulative supplement. The reference in (9)(B) to “§ 67-4-409(a)(3)(A)(i) and (a)(3)(A)(i), (E), and (F)” was corrected to read “§ 67-4-409(a)(3)(A)(i), (E), and (F)”.

TITLE 16
COURTS
CHAPTER 10
CIRCUIT AND CRIMINAL COURTS

PART 1 JURISDICTION AND POWERS

16-10-108. Divorce — Adoption — Trustees.

NOTES TO DECISIONS

2. Jurisdiction.

Trial court had jurisdiction over a divorce action and thus, properly exercised its jurisdiction to order foreign land sold and equitably divide and distribute the proceeds from the sale of the marital property because it sought to compel the husband, his brother, and his sister-in-law to convey the land so as to realize the wife's marital share of the assets transferred during the pendency of the divorce; the order did not attempt to set aside the transactions relating to the property. *Sekik v. Abdelnabi*, — S.W.3d —, 2020 Tenn. App. LEXIS 516 (Tenn.

Ct. App. Nov. 18, 2020), vacated, — S.W.3d —, 2021 Tenn. App. LEXIS 11 (Tenn. Ct. App. Jan. 12, 2021), substituted opinion, — S.W.3d —, 2021 Tenn. App. LEXIS 10 (Tenn. Ct. App. Jan. 13, 2021).

Trial court had subject matter jurisdiction and properly exercised that jurisdiction to order marital property in Gaza sold and the proceeds equitably distributed where the gravamen of the wife's complaint was a divorce matter. *Sekik v. Abdelnabi*, — S.W.3d —, 2021 Tenn. App. LEXIS 10 (Tenn. Ct. App. Jan. 13, 2021).

CHAPTER 11
CHANCERY COURTS

PART 1 JURISDICTION AND POWERS

16-11-102. Jurisdiction of civil causes — Transfer to circuit court.

NOTES TO DECISIONS

47. Jurisdiction — Objections.

Although briefing was submitted to the appellate court regarding whether a case involved unliquidated damages and therefore should properly have been in circuit court as opposed to the chancery court, the appellate court made no further inquiry into the matter. Because

there was no evidence of an objection taken by a plea to jurisdiction in the trial court, there was no basis to conclude then that the chancery court was not permitted to hear the lawsuit. *Hawthorne v. Morgan & Morgan Nashville PLLC*, — S.W.3d —, 2020 Tenn. App. LEXIS 576 (Tenn. Ct. App. Dec. 17, 2020).

CHAPTER 15

COURTS OF GENERAL SESSIONS

PART 5 JURISDICTION

16-15-505. Objections to jurisdiction.

NOTES TO DECISIONS

1. Waiver.

Litigant did not waive the issue of insufficient service of process because an appearance by the litigant's counsel in the general sessions court to file a motion to dismiss did not constitute a waiver of lack of personal jurisdiction through insufficient or improper service. Fur-

ther, nothing in the record indicated that the litigant sought affirmative action from the court on an issue related to the merits of the dispute in the general sessions court prior to filing a motion to dismiss. *Assocs. Asset Mgmt., LLC v. Smith*, — S.W.3d —, 2020 Tenn. App. LEXIS 490 (Tenn. Ct. App. Sept. 3, 2020).

PART 9 SERVICE OF PROCESS

16-15-903. Service upon defendants in this state.

NOTES TO DECISIONS

3. Questions regarding Service.

Circuit court erred in dismissing a judgment debtor's motion for relief from a judgment entered against him in a general sessions court because, while the motion was filed approximately eight years after the judgment was entered and the trial court held that it lacked jurisdiction based on the expiration of the statutory 10-day time period, the judgment

debtor's averments created a dispute of fact regarding whether proper service was achieved, and the parties should be allowed to develop an evidentiary record concerning the question of whether the judgment creditor properly served the judgment debtor. *TBF Fin. LLC v. Simmons*, — S.W.3d —, 2020 Tenn. App. LEXIS 512 (Tenn. Ct. App. Nov. 18, 2020).

CHAPTER 16

COUNTY COURTS

PART 2 TRANSFER OF PROBATE JURISDICTION TO CHANCERY COURT

16-16-201. Probate jurisdiction and administration of estates in chancery court.

NOTES TO DECISIONS

2. Jurisdiction.

Circuit court lacked subject matter jurisdiction over the probate of a will where nothing in the appellate record indicated that a will contest had been filed, and thus, subject matter jurisdiction was vested exclusively in probate court. Although a circuit court judge could sit by interchange in the probate court, in the

instant case the case had been transferred to circuit court based on the court orders and the circuit court's actions. As a result, the circuit court's orders and actions were invalid for lack of subject matter jurisdiction. In re *Estate of Ellis*, — S.W.3d —, 2020 Tenn. App. LEXIS 564 (Tenn. Ct. App. Dec. 14, 2020).

TITLE 17
JUDGES AND CHANCELLORS
CHAPTER 2
SPECIAL JUDGES AND INTERCHANGE

PART 1 SPECIAL JUDGES

17-2-112. Transfers from chancery to circuit court because of incompetency.

NOTES TO DECISIONS

1. Construction.

T.C.A. §§ 17-2-206 and 17-2-112, when read together, clearly indicate that an interchange is effected by a judge sitting in a court to which he or she was not elected or appointed, not the transfer of a case from one court to another. In other words, our interchange framework does not grant a court that otherwise lacks subject

matter jurisdiction the power to adjudicate the case; it simply authorizes judges from other courts to sit by interchange in a court with subject matter jurisdiction when the original judge cannot preside over the matter for whatever reason. In re Estate of Ellis, — S.W.3d —, 2020 Tenn. App. LEXIS 564 (Tenn. Ct. App. Dec. 14, 2020).

PART 2 INTERCHANGE

17-2-206. Powers on interchange.

NOTES TO DECISIONS

5. Construction.

T.C.A. §§ 17-2-206 and 17-2-112, when read together, clearly indicate that an interchange is effected by a judge sitting in a court to which he or she was not elected or appointed, not the transfer of a case from one court to another. In other words, our interchange framework does not grant a court that otherwise lacks subject

matter jurisdiction the power to adjudicate the case; it simply authorizes judges from other courts to sit by interchange in a court with subject matter jurisdiction when the original judge cannot preside over the matter for whatever reason. In re Estate of Ellis, — S.W.3d —, 2020 Tenn. App. LEXIS 564 (Tenn. Ct. App. Dec. 14, 2020).

TITLE 20
CIVIL PROCEDURE
CHAPTER 1
PARTIES TO ACTIONS

20-1-119. Comparative fault — Joinder of third party defendants.

NOTES TO DECISIONS

10. Amended Complaint.

Current version of the rule for amending a complaint dispenses with two of the requirements outlined in the case law: (1) the filing of a motion to amend and (2) an order granting the motion to amend. Under the current version

of the rule for amending a complaint and the case law, a plaintiff relying on the statute for joinder of third party defendants based on comparative fault must satisfy two requirements within 90 days: (1) file an amended complaint and (2) cause process to be issued to the

party named in the amended complaint. *Bidwell ex rel. Bidwell v. Strait*, — S.W.3d —, 2021 Tenn. LEXIS 9 (Tenn. Jan. 28, 2021).

In a health care liability action, although the physicians sufficiently asserted comparative fault, triggering this statute's savings provision, plaintiff did not actually amend his com-

plaint with 90 days of the first physician's answer naming the physicians' actual employer as a defendant, and the physicians were entitled to summary judgment. *Bidwell ex rel. Bidwell v. Strait*, — S.W.3d —, 2021 Tenn. LEXIS 9 (Tenn. Jan. 28, 2021).

CHAPTER 2

PROCESS

PART 2 LONG-ARM STATUTES

20-2-214. Jurisdiction of persons unavailable to personal service in state — Classes of actions to which applicable.

NOTES TO DECISIONS

ANALYSIS

9. Tortious Act.
13. Contracts.

9. Tortious Act.

Trial court properly exercised personal jurisdiction over a husband's brother and sister-in-law because the wife's complaint alleged the husband, brother, and sister-in-law attempted to convey property and sequester funds while the divorce was pending, which constituted a civil conspiracy; the brother and sister-in-law appeared to defend the allegations and filed a counter/cross-claim, thus availing themselves of the trial court's jurisdiction, and they did not object to personal jurisdiction. *Sekik v. Abdelnabi*, — S.W.3d —, 2020 Tenn. App. LEXIS 516 (Tenn. Ct. App. Nov. 18, 2020), vacated, — S.W.3d —, 2021 Tenn. App. LEXIS 11 (Tenn. Ct. App. Jan. 12, 2021), substituted opinion, — S.W.3d —, 2021 Tenn. App. LEXIS 10 (Tenn. Ct. App. Jan. 13, 2021).

13. Contracts.

In a breach of contract case, a Tennessee court could exercise specific personal jurisdiction over the Texas corporation because, after evaluating the Texas corporation's contacts with Tennessee related to the contract that formed the basis for the Tennessee company's suit, the circumstances exhibited intentional or purposeful acts on the part of the Texas corporation; the Texas corporation's contacts were substantial enough as it voluntarily elected to contract with the Tennessee company, and the Texas corporation knew that the contractual work would occur primarily in Tennessee; and the Texas corporation did not carry its burden of establishing that the exercise of personal jurisdiction in Tennessee would be unreasonable or unfair. *Crouch Ry. Consulting, LLC v. LS Energy Fabrication, LLC*, — S.W.3d —, 2020 Tenn. LEXIS 412 (Tenn. Oct. 6, 2020).

CHAPTER 5

ABATEMENT AND SURVIVAL OF ACTIONS

20-5-102. Actions surviving death of party.

NOTES TO DECISIONS

ANALYSIS

3. Cause of Action.
19. Persons Authorized to Sue.

3. Cause of Action.

Mother's son died before ever commencing an action, and thus the second part of T.C.A.

§ 20-5-102 was applicable. *Jones v. Martin*, — S.W.3d —, 2020 Tenn. App. LEXIS 525 (Tenn. Ct. App. Nov. 20, 2020).

19. Persons Authorized to Sue.

Mother clearly had authority, as her son's next of kin, to bring the action pursuant to the statutes, which plainly allows the tort survival

action to pass to the surviving spouse or next of kin and for that person to commence and control the action. Jones v. Martin, — S.W.3d —, 2020 Tenn. App. LEXIS 525 (Tenn. Ct. App. Nov. 20, 2020).

20-5-103. Causes surviving death of tort-feasor.

NOTES TO DECISIONS

6. Service Upon Personal Representative.

Statute of limitations commenced from the date of the automobile accident, and upon decedent's death, the statute was tolled; because no personal representative was appointed during the six-month period after decedent's death, the statute

of limitations began running again. Plaintiff did not substitute the administrator as the proper party before expiration of the statute of limitations and thus failed to strictly follow the survival statute, which was fatal to his action. Mott v. Luethke, — S.W.3d —, 2021 Tenn. App. LEXIS 98 (Tenn. Ct. App. Mar. 16, 2021).

20-5-106. Injury resulting in death — Succession to cause of action — Beneficiaries.

NOTES TO DECISIONS

45. Substitution of Parties.

Mother clearly had authority, as her son's next of kin, to bring the action pursuant to the statutes, which plainly allows the tort survival action to pass

to the surviving spouse or next of kin and for that person to commence and control the action. Jones v. Martin, — S.W.3d —, 2020 Tenn. App. LEXIS 525 (Tenn. Ct. App. Nov. 20, 2020).

CHAPTER 6
PLEADINGS

PART 2 DECLARATIONS

20-6-201. Successive actions.

NOTES TO DECISIONS

1. Applicability.

In this breach of a commercial lease agreement case, the dispositive issue was whether the landlord was entitled to recover damages, not whether it could bring a successive action on the same contract or transaction when a new cause of action arose; as the jury found that the landlord did not

suffer any damages, whether the landlord was entitled to an instruction on successive actions was moot. Even if the trial court erred by excluding the instruction, it was harmless because it resulted in no prejudice. Bop, LLC v. Plastic Surgery of Nashville, P.C., — S.W.3d —, 2020 Tenn. App. LEXIS 447 (Tenn. Ct. App. Oct. 8, 2020).

CHAPTER 7
CONTINUANCES

20-7-101. Grounds — Timing.

NOTES TO DECISIONS

ANALYSIS

1. Judicial Discretion.

Given the length of time the proceeding had been pending, the fact that trial had already been continued once, the fact that Husband

- 1. Judicial Discretion.
- 2. Request Properly Denied.

was aware of the consequences of not retaining counsel (i.e., that he would represent himself), the fact that the husband was not guaranteed the assistance of counsel in the instant civil proceeding, and the lack of any attestations to the court of the husband's diligence in attempting to locate new counsel, no abuse of discretion was discerned in the trial court's decision to proceed with trial despite the withdrawal of the husband's counsel, especially when no motion or request for a continuance was actually made. *Sekik v. Abdelnabi*, — S.W.3d —, 2021 Tenn. App. LEXIS 10 (Tenn. Ct. App. Jan. 13, 2021).

2. Request Properly Denied.

Given the length of time the proceeding had been pending, the fact that trial had been

continued once, the fact that a husband was aware of the consequences of not retaining counsel, the fact that he was not guaranteed the assistance of counsel in the civil proceeding, and the lack of attestations to the court of his diligence in attempting to locate new counsel, there was no abuse of discretion in the trial court's decision to proceed with trial despite the withdrawal of the husband's counsel. *Sekik v. Abdelnabi*, — S.W.3d —, 2020 Tenn. App. LEXIS 516 (Tenn. Ct. App. Nov. 18, 2020), vacated, — S.W.3d —, 2021 Tenn. App. LEXIS 11 (Tenn. Ct. App. Jan. 12, 2021), substituted opinion, — S.W.3d —, 2021 Tenn. App. LEXIS 10 (Tenn. Ct. App. Jan. 13, 2021).

CHAPTER 9

TRIAL

PART 3 ARGUMENTS

20-9-301. Opening statements — Right of parties to make.

NOTES TO DECISIONS

4. Prosecutor's Statement Proper.

No error in the State's opening statements regarding the video evidence and the identity of defendant as the seller of the drugs affected the outcome of the trial to defendant's prejudice because the jury was able to view the video, which delivered a clear view of the offender, to determine the issue of identity; the prosecution

presented a witness who was familiar with defendant and who identified him as the lone person in the vehicle used in the drug transaction; and defendant was in possession of over \$300 in cash and digital scales with cocaine residue. *State v. Smith*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 716 (Tenn. Crim. App. Nov. 12, 2020).

CHAPTER 12

COSTS

20-12-101. Recovery by successful party.

NOTES TO DECISIONS

ANALYSIS

- 11. Amount of Judgment.
- 15. —Nominal Damages Recovered.

11. Amount of Judgment.

15. —Nominal Damages Recovered.

Trial court did not abuse its discretion in its allocation of court costs because plaintiffs were

only partially successful in their claims against defendant, resulting in a judgment for the proceeds from the sale of the property and nominal damages of \$50. *Gibbons v. Bennett*, — S.W.3d —, 2021 Tenn. App. LEXIS 49 (Tenn. Ct. App. Feb. 9, 2021).

20-12-119. Discretion of judge.

NOTES TO DECISIONS

ANALYSIS

1. Construction with Other Acts.
18. Requirements.
19. Attorney's Fees Precluded.
20. When Attorney Fees Permitted.

1. Construction with Other Acts.

"Proceedings" means all acts and events that occur as a result of the dismissed claim(s) from the date the dismissed claim(s) is filed; thus, when a trial court grants a motion to dismiss, the statute requires the trial court to award the party or parties against whom the dismissed claims were pending at the time the motion to dismiss was granted the costs and reasonable attorney fees incurred by the party due to the dismissed claims from the date those claims were filed. *Donovan v. Hastings*, — S.W.3d —, 2020 Tenn. App. LEXIS 483 (Tenn. Ct. App. Oct. 30, 2020).

Taken together, T.C.A. § 20-12-119(c)(1) and (c)(3) clarify that when a motion for failure to state a claim is granted, the trial court shall find that attorney's fees are recoverable to the prevailing party; however, the trial court may not proceed past that point inasmuch as the award of attorney's fees is stayed. A trial court's order can be final despite the outstanding issue of recoverable attorney's fees when those fees are awarded by virtue of § 20-12-119(c). *Irvin v. Green Wisehomes, LLC*, — S.W.3d —, 2021 Tenn. App. LEXIS 63 (Tenn. Ct. App. Feb. 26, 2021).

18. Requirements.

Trial court properly denied a motion by a company's owners for attorney's fees because their renewed motion did not qualify as the motion referenced in the statute pursuant to which fees could be awarded. *Cored, LLC v. Hatcher*, — S.W.3d —, 2020 Tenn. App. LEXIS 444 (Tenn. Ct. App. Oct. 6, 2020).

19. Attorney's Fees Precluded.

Appellant did not delineate for the trial court the amount of fees incurred for the hearing on the motion to dismiss and thus failed to meet her burden of proof; the trial court declined to value those fees absent the requisite proof,

which was within its discretion to do, and no abuse of discretion was found. *Donovan v. Hastings*, — S.W.3d —, 2020 Tenn. App. LEXIS 483 (Tenn. Ct. App. Oct. 30, 2020).

20. When Attorney Fees Permitted.

Statute requires that there be an unappealable final decision before a trial court can award attorney fees pursuant to the statute; in this case, the May 24, 2019 order resolved all claims and neither party appealed or filed a post-judgment motion. Thus, the order became final and unappealable on June 23, 2019, and because an award of fees was stayed until that time, appellant's motion for fees filed two weeks later was not too late to entitle her to an award of fees under the statute. *Donovan v. Hastings*, — S.W.3d —, 2020 Tenn. App. LEXIS 483 (Tenn. Ct. App. Oct. 30, 2020).

Amended countercomplaint was the latest countercomplaint in which the breach of contract claim was made and appellant filed her motion to dismiss the amended countercomplaint within 60 days of the time she was served, and thus the exception set forth in T.C.A. § 20-12-119(c)(5)(B) regarding attorney fees did not apply. *Donovan v. Hastings*, — S.W.3d —, 2020 Tenn. App. LEXIS 483 (Tenn. Ct. App. Oct. 30, 2020).

Because the trial court dismissed the breach of contract claim in the amended countercomplaint, appellant was entitled to an award of attorney fees she incurred as a result of the breach of contract claim from the date the amended countercomplaint was filed, and the trial court properly excluded the requested attorney fees that were incurred prior to that date. *Donovan v. Hastings*, — S.W.3d —, 2020 Tenn. App. LEXIS 483 (Tenn. Ct. App. Oct. 30, 2020).

Trial court did not abuse its discretion in excluding duplicate fees; the court concluded that duplicate time entries for two attorneys to perform the same work on the motion to dismiss were to be excluded because they were unnecessary and unreasonable in light of the single, narrow legal issue presented and the relative dollar amount at issue on the dismissed breach of contract claim. *Donovan v. Hastings*, — S.W.3d —, 2020 Tenn. App. LEXIS 483 (Tenn. Ct. App. Oct. 30, 2020).

CHAPTER 13

ACTIONS BY AND AGAINST STATE

20-13-102. Actions against state prohibited.

NOTES TO DECISIONS

ANALYSIS

3. Extent of Prohibition.
5. —Suits Against Officers.

3. Extent of Prohibition.

5. —Suits Against Officers.

Trial court, on remand, properly granted a motion filed by the commissioner of the Department of General Services for summary judgment in a former employee's action for alleged unpaid holiday compensation because the suit against the commissioner in his official capacity was actually a suit against his office, the Department proved the necessary statutory criteria, and the employee was not a state employee on the last scheduled workday immediately preceding the holiday at issue. *Arnold v. Oglesby*, — S.W.3d —, 2020 Tenn. App. LEXIS 344 (Tenn. Ct. App. July 30, 2020).

ment in a former employee's action for alleged unpaid holiday compensation because the suit against the commissioner in his official capacity was actually a suit against his office, the Department proved the necessary statutory criteria, and the employee was not a state employee on the last scheduled workday immediately preceding the holiday at issue. *Arnold v. Oglesby*, — S.W.3d —, 2020 Tenn. App. LEXIS 344 (Tenn. Ct. App. July 30, 2020).

CHAPTER 16

SUMMARY JUDGMENT

20-16-101. Burden of proof in summary judgment motions.

Workers' Compensation Appeals Board Decisions. An employee alleged various injuries caused by a fall at work. After some discovery was conducted, the employer filed a motion for summary judgment, alleging the employee's evidence was insufficient as a matter of law to establish a compensable injury. After requesting and receiving additional time to respond to the motion, the employee's counsel filed a motion to withdraw. The trial court scheduled a hearing on both motions, requiring the employee's counsel to present his client's argument in response to the motion for summary judgment prior to its entertaining the motion to withdraw. During his argument, the employee's counsel acknowledged he had no expert medical evidence to submit in opposition to the employer's motion for summary judgment. Following the hearing, the trial court granted the motion to withdraw but denied the motion for summary judgment. The employer has appealed. Upon careful consideration of the record, the trial court's order denying the motion for summary judgment was reversed and the case was remanded for entry of an order granting the motion. *King v. Kasai North America, Inc.*, 2019 TN Wrk Comp App Bd LEXIS 16.

draw. During his argument, the employee's counsel acknowledged he had no expert medical evidence to submit in opposition to the employer's motion for summary judgment. Following the hearing, the trial court granted the motion to withdraw but denied the motion for summary judgment. The employer has appealed. Upon careful consideration of the record, the trial court's order denying the motion for summary judgment was reversed and the case was remanded for entry of an order granting the motion. *King v. Kasai North America, Inc.*, 2019 TN Wrk Comp App Bd LEXIS 16.

TITLE 23

ATTORNEYS-AT-LAW

CHAPTER 2

RIGHTS AND DUTIES

23-2-102. Lien on right of action.

NOTES TO DECISIONS

15. Lien Properly Imposed.

Trial court, which found an attorney's lien in a divorce action was valid and enforceable because neither party performed their respective obligations under the divorce decree, correctly found that the wife's former attorneys secured for the wife the equity in two properties, and that neither the husband nor his estate paid the equity in the properties to the wife. *Baker-Brunkhorst v. Brunkhorst*, — S.W.3d —, 2021 Tenn. App. LEXIS 62 (Tenn. Ct. App. Feb. 23, 2021).

secured for the wife the equity in two properties, and that neither the husband nor his estate paid the equity in the properties to the wife. *Baker-Brunkhorst v. Brunkhorst*, — S.W.3d —, 2021 Tenn. App. LEXIS 62 (Tenn. Ct. App. Feb. 23, 2021).

TITLE 24

EVIDENCE AND WITNESSES

CHAPTER 5

PRESUMPTIONS

24-5-107. Sworn accounts.

NOTES TO DECISIONS

2. Tort Claims Not Covered.

Statute is not meant to provide an alternative theory of liability to traditional tort or contract actions, and thus the statute does not create a separate cause of action, but rather establishes a procedure by which a plaintiff may pursue a cause of action; appellant's un-

derlying cause of unjust enrichment was preempted by the Airline Deregulation Act, and thus appellant could not recover by asserting action on a sworn account as a separate cause of action. *Phi Air Med., LLC v. Corizon, Inc.*, — S.W.3d —, 2021 Tenn. App. LEXIS 85 (Tenn. Ct. App. Mar. 8, 2021).

CHAPTER 7

ADMISSIBILITY OF EVIDENCE

24-7-113. Voluntary acknowledgment of paternity.

NOTES TO DECISIONS

ANALYSIS

2. Contested Voluntary Acknowledgements of Paternity.
3. Standing to Sue for Visitation Rights.
2. Contested Voluntary Acknowledgements of Paternity.

Although a legal parent, who was not the biological father of a child, claimed that the voluntary acknowledgment of paternity (VAP) for the child which the legal parent signed should have been rescinded due to a material mistake of fact in that the legal parent did not appreciate the consequences of signing the VAP, the VAP was not rescinded within 60 days of its

completion and submission and the legal parent failed to prove the existence of a material mistake of fact that would have warranted rescission of the VAP. Accordingly, the legal parent was properly ordered to pay child support. *State ex rel. Kimberly C. v. Gordon S.*, — S.W.3d —, 2020 Tenn. App. LEXIS 541 (Tenn. Ct. App. Nov. 30, 2020).

3. Standing to Sue for Visitation Rights.

Although the voluntary acknowledgement of paternity signed by the mother and the father alone did not vest custody rights or visitation rights upon the legal father, it did vest the father with standing to sue for those rights. *Baxter v. Rowan*, — S.W.3d —, 2020 Tenn. App. LEXIS 569 (Tenn. Ct. App. Dec. 15, 2020).

24-7-123. Admission of video recording of interview of child describing sexual conduct.

NOTES TO DECISIONS

1. Admissibility.

Trial court did not abuse its discretion in admitting video recordings of a child sexual abuse victim's forensic interviews with a forensic interviewer because the court conducted an appropriate analysis of their trustworthiness in

which various witnesses offered testimony to establish how the recordings were made, the interviewer described the interviewer's training and education, the interviewer did not use any inappropriate leading questions, and the court noted that the interviewer was one of the

better interviewers the court had seen. *State v. Rickard*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 67 (Tenn. Crim. App. Feb. 28, 2021).

CHAPTER 9

DEPOSITIONS

PART 1 GENERAL PROVISIONS

24-9-101. Deponents exempt from subpoena to trial but subject to subpoena to deposition — Award of fees and expenses if court grants motion to quash.

2. —Deposition of Witness Not Exempt from Trial.

Admitting portions of a physician's deposition transcript pursuant to Tenn. R. Civ. P. 32.01(3) was not error where, as a practicing physician, he was exempt from subpoena to

trial under T.C.A. § 24-9-101(a), and thus unavailable under Tenn. R. Evid. 804(a)(5). *Spearman v. Shelby Cty. Bd. of Educ.*, — S.W.3d —, 2021 Tenn. App. LEXIS 17 (Tenn. Ct. App. Jan. 15, 2021).

TITLE 25

JUDGMENTS

CHAPTER 3

JUDGMENT BY MOTION

25-3-122. Motion by surety.

NOTES TO DECISIONS

ANALYSIS

1. Effect of Section.
13. Compliance.

1. Effect of Section.

Statute was not superseded by Tenn. R. Civ. P. 65A because Rule 65A was inapplicable to the claims by sureties against their principals as Rule 65A allowed for a judgment against the surety without the necessity of an independent action, while statute allowed for the surety to obtain a judgment against its principal by motion. *Nelson v. Justice*, — S.W.3d —, 2021 Tenn. App. LEXIS 91 (Tenn. Ct. App. Mar. 9, 2021).

Statute was not preempted by the federal diversity jurisdiction statute. *Nelson v. Justice*,

— S.W.3d —, 2021 Tenn. App. LEXIS 91 (Tenn. Ct. App. Mar. 9, 2021).

13. Compliance.

Entry of judgment on an appeal bond for attorney fees was appropriate because the surety was entitled to a judgment against the party who procured the bond in the amount of the award in attorney fees, the bond was not nullified for lack of consideration, the plain language of the bond did not set forth as a condition precedent to its enforceability the trial court's formal approval of the bond, and the party which procured the appeal bond was not denied due process in violation of U.S. Const. amend. XIV and Tenn. Const. art. I, § 8. *Nelson v. Justice*, — S.W.3d —, 2021 Tenn. App. LEXIS 91 (Tenn. Ct. App. Mar. 9, 2021).

CHAPTER 5

LIEN OF JUDGMENT

25-5-101. Real property.

NOTES TO DECISIONS

ANALYSIS

24. Decisions Since 1967 Amendment.
25. —Application and Scope.

24. Decisions Since 1967 Amendment.

25. —Application and Scope.

Trial court erred in awarding a wife a lien to secure the wife's alimony in solido payment

against various parcels of real property because the parcels were owned by limited liability companies which the husband owned and not by the husband, individually. *Barton v. Barton*, — S.W.3d —, 2020 Tenn. App. LEXIS 502 (Tenn. Ct. App. Nov. 10, 2020).

TITLE 26

EXECUTION

CHAPTER 6

ENFORCEMENT OF FOREIGN JUDGMENTS

PART 1 UNIFORM ENFORCEMENT OF FOREIGN JUDGMENTS ACT

26-6-101. Short title.

NOTES TO DECISIONS

4. Full Faith And Credit.

Foreign judgment was a money judgment made by a New York court, entered in accordance with Uniform Enforcement of Foreign Judgments Act procedures, and defendants were afforded the opportunity to be heard and

did not raise a due process issue; thus, the New York judgment was accorded full faith and credit. *Capital v. TNG Contrs., LLC*, — S.W.3d —, 2020 Tenn. App. LEXIS 509 (Tenn. Ct. App. Nov. 16, 2020).

26-6-104. Effect and treatment of authenticated foreign judgment — Foreign defamation judgment.

NOTES TO DECISIONS

4. Validity.

When a Texas franchiser sought to enroll a default judgment obtained in a lawsuit in Texas, the Texas summons and complaint were properly served on a franchisee and personal guarantors in Tennessee as the process server's affidavit supporting the franchiser's motion for substitute service complied with the require-

ments of the Texas Rules of Civil Procedure, the Texas court's order instructing the process server where and how to serve the summons was appropriate, and the method of service was a reasonably effective means of providing notice. *Mr. Appliance, LLC v. Appliance Servs. of Tenn., LLC*, — S.W.3d —, 2020 Tenn. App. LEXIS 540 (Tenn. Ct. App. Nov. 30, 2020).

TITLE 27
APPEAL AND REVIEW
CHAPTER 1
GENERAL PROVISIONS

27-1-122. Damages for frivolous appeal.

NOTES TO DECISIONS

ANALYSIS

2. Frivolous Appeals.
4. Non-Frivolous Appeal.
5. Attorney Fees Denied.
6. Attorney Fees Granted.
21. Attorney's Fees Precluded.

2. Frivolous Appeals.

Defendants' appeal was devoid of merit and had no reasonable chance of succeeding as the fence was on the property line when the wife bought the house where it remained until plaintiff purchased the property next door; defendants' deed did not describe the frontage as 45 feet, only 42 or 43; and the former owner and former tenant of plaintiffs property testified that the fence was the property line. *Cumberland Advisory Grp., LLC v. Lee*, — S.W.3d —, 2021 Tenn. App. LEXIS 131 (Tenn. Ct. App. Mar. 31, 2021).

4. Non-Frivolous Appeal.

Although none of the company's issues entitled it to relief, the court could not conclude that this appeal rose to the level of being devoid of merit; the company's argument as to its first issue was, although not persuasive, colorable, and the court declined to award damages. *Irvin v. Green Wisehomes, LLC*, — S.W.3d —, 2021 Tenn. App. LEXIS 63 (Tenn. Ct. App. Feb. 26, 2021).

5. Attorney Fees Denied.

Although mother prevailed in this appeal, the father's appeal was not frivolous or taken solely for delay, so fees were denied. *Napier v. Napier*, — S.W.3d —, 2020 Tenn. App. LEXIS 332 (Tenn. Ct. App. July 27, 2020).

Because the appeal was not frivolous or taken solely for delay, the court denied intervenors' request for attorney fees on appeal. *Druk v. Hydrogen Engine Ctr., Inc.*, — S.W.3d —, 2020 Tenn. App. LEXIS 481 (Tenn. Ct. App. Oct. 30, 2020).

Because a wife did not raise the issue of the husband's appeal being a frivolous appeal or the fact that she sought her attorney's fees on appeal in her statement of the issues, the court of appeals declined to award attorney's fees in

the appeal. *Sekik v. Abdelnabi*, — S.W.3d —, 2020 Tenn. App. LEXIS 516 (Tenn. Ct. App. Nov. 18, 2020), vacated, — S.W.3d —, 2021 Tenn. App. LEXIS 11 (Tenn. Ct. App. Jan. 12, 2021), substituted opinion, — S.W.3d —, 2021 Tenn. App. LEXIS 10 (Tenn. Ct. App. Jan. 13, 2021).

Although one of appellant's arguments was waived by appellant's failure to properly brief the argument, appellant did raise another argument that, if successful, would have resulted in a new trial. As such, the appellate court declined to deem appellant's appeal frivolous or to award attorney's fees incurred in any portion of the appeal. *Payne v. Bradley*, — S.W.3d —, 2021 Tenn. App. LEXIS 73 (Tenn. Ct. App. Mar. 01, 2021).

6. Attorney Fees Granted.

Plaintiff's request for attorney fees, costs, and expenses incurred on appeal was granted because defendants' appeal had no prospect of success; notably absent from defendants' brief was any acknowledgement that their assent to the settlement's terms was under oath and upon counsel's advice; and the trial court found several problems with defendants' proposed statement of the evidence as, inter alia, defendants falsely claimed that the trial court would not permit pretrial motions, such as a motion for continuance, where they did not file any such pretrial motion. *MC Builders, LLC v. Reveiz*, — S.W.3d —, 2020 Tenn. App. LEXIS 495 (Tenn. Ct. App. Nov. 5, 2020).

21. Attorney's Fees Precluded.

Trial court did not err in finding that one party was pro se for purposes of T.C.A. § 20-12-119(c)(5)(D); while the party's pleadings were, in large part, verbatim to the pleadings filed by the other parties, a notice of appearance was never entered for the party and he signed his own pleadings. Additionally, the trial court did not abuse its discretion in declining to find that the party acted unreasonably in bringing his dismissed claims. *Irvin v. Green Wisehomes, LLC*, — S.W.3d —, 2021 Tenn. App. LEXIS 63 (Tenn. Ct. App. Feb. 26, 2021).

Appeal was devoid of merit and had no reasonable chance of succeeding, and thus defen-

dant was entitled to recover the reasonable and necessary expenses and costs incurred on appeal. *Davis v. Sovereign Invs., LLC*, — S.W.3d

—, 2021 Tenn. App. LEXIS 128 (Tenn. Ct. App. Mar. 30, 2021).

CHAPTER 5

APPEALS FROM GENERAL SESSIONS COURT AND MUNICIPAL OFFICERS

27-5-102. Appeal from recorder or municipal officer.

NOTES TO DECISIONS

6. Case Removed by Appeal.

This action originated in municipal court and was timely appealed to the trial court; pursuant to the plain language of the rule, this action

clearly constituted a case removed by appeal to the chancery or circuit courts. *City of Athens v. Straser*, — S.W.3d —, 2020 Tenn. App. LEXIS 464 (Tenn. Ct. App. Oct. 20, 2020).

CHAPTER 7

WRIT OF ERROR CORAM NOBIS

27-7-103. Petition — Supersedeas.

NOTES TO DECISIONS

17. Appeal.

Because the trial court did not rule on the issue of the timeliness of defendant's petition for writ of error coram nobis, nor was the record developed concerning the same, the appellate

court only addressed the trial court's findings as to the merits of the petition. *Story v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 111 (Tenn. Crim. App. Mar. 25, 2021).

CHAPTER 9

REVIEW OF BOARDS AND COMMISSIONS

27-9-102. Filing and contents of petition.

NOTES TO DECISIONS

2. Time for Filing Petition.

When a board of zoning appeals granted a variance request, the city codes director checked a box on the variance application indicating that the request was approved, and, at its next meeting, the board approved the minutes from its prior meeting in which the variance request was granted. Because the board's

decision was not entered until the approval of the minutes at the later board meeting, a petition for certiorari filed by companies that opposed the variance was timely filed within sixty days of the entry of the board's decision. *Manchester Hotel Hospitality, LLC v. City of Manchester*, — S.W.3d —, 2020 Tenn. App. LEXIS 537 (Tenn. Ct. App. Nov. 30, 2020).

27-9-114. Proceedings involving certain public employees.**NOTES TO DECISIONS****ANALYSIS**

1. Reinstatement of Employee.
2. Exhausting Administrative Remedy.
5. Application of Section.

1. Reinstatement of Employee.

Trial court properly reversed a civil service commission's decision to reinstate a police officer where the commission and court identified the appropriate program provisions that applied to the disciplinary proceeding, the expert testimony supported a finding that the supplement the officer consumed was an immediate precursor to a controlled substance, the police officer tested positive for a controlled substance, and that positive drug test constituted a violation of the departmental policy that merited termination. Thus, the commission rendered an arbitrary and capricious decision by substituting its judgment for the rules and policies of the police department. *Metro. Gov't of Nashville & Davidson Cty. v. Civil Serv. Comm'n of the Metro. Gov't of Nashville & Davidson Cty.*, — S.W.3d —, 2020 Tenn. App. LEXIS 571 (Tenn. Ct. App. Dec. 16, 2020).

2. Exhausting Administrative Remedy.

Petitioners sought review of the Pension Board's decision, but chose the wrong mecha-

nism in seeking a writ of certiorari instead of review under the Uniform Administrative Procedure Act; however, there was clear precedent for disregarding this mistake. Although the city blamed petitioners for the lack of a required contested case hearing, they clearly sought to contest the Board's decision and the fact that their appeal requests fell through the cracks did not absolve the city from responsibility and exhaustion was not mandatory here. *Murrell v. Bd. of Admin. Memphis Pension & Ret. Sys.*, — S.W.3d —, 2021 Tenn. App. LEXIS 133 (Tenn. Ct. App. Mar. 31, 2021).

5. Application of Section.

Petitioners sought review of the Pension Board's decision, but chose the wrong mechanism in seeking a writ of certiorari instead of review under the Uniform Administrative Procedure Act; however, there was clear precedent for disregarding this mistake. Although the city blamed petitioners for the lack of a required contested case hearing, they clearly sought to contest the Board's decision and the fact that their appeal requests fell through the cracks did not absolve the city from responsibility and exhaustion was not mandatory here. *Murrell v. Bd. of Admin. Memphis Pension & Ret. Sys.*, — S.W.3d —, 2021 Tenn. App. LEXIS 133 (Tenn. Ct. App. Mar. 31, 2021).

TITLE 28**LIMITATION OF ACTIONS****CHAPTER 1****GENERAL PROVISIONS****28-1-105. New action after adverse decision — Contractual limitations periods.****NOTES TO DECISIONS****ANALYSIS**

- | | |
|---|---|
| <ol style="list-style-type: none"> 7. Construction and Interpretation. 14. —Second Suit Not Within Statute. | <ol style="list-style-type: none"> 17. Prerequisites to Application. 22. —Dismissal Not on Merits. 62. Period for Filing New Suit. 81. Savings Statute. |
|---|---|

7. Construction and Interpretation.**14. —Second Suit Not Within Statute.**

Selling shareholder cited no specific procedural rule in support of his motion to reinstate the manager and the officer as party defendants because he did not file a new action against them within one year of the order of voluntary dismissal. *Lance v. Alcoa Hotel Hosp., LLC*, — S.W.3d —, 2020 Tenn. App. LEXIS 507 (Tenn. Ct. App. Nov. 16, 2020).

17. Prerequisites to Application.**22. —Dismissal Not on Merits.**

Because the savings statute applied, the trial court properly denied an employer's motion for summary judgment; a truck driver and his wife were entitled to the benefits afforded by the savings statute because their action was commenced within the limitations period, the voluntary dismissal of a prior case did not conclude their right of action, and they commenced the new action within one year of the voluntary dismissal without prejudice. *Helyukh v. Buddy Head Livestock & Trucking, Inc.*, — S.W.3d —, 2020 Tenn. App. LEXIS 395 (Tenn. Ct. App. Aug. 28, 2020).

62. Period for Filing New Suit.

Because plaintiff did not file the third products liability action within one year after the federal court dismissed her first action ? the only lawsuit filed within the statutory limitations period ? the trial court correctly dismissed it as untimely filed, and was not saved by the saving statute. *Conine v. Medtronic Sofamor Danek USA, Inc.*, — S.W.3d —, 2021 Tenn. App. LEXIS 86 (Tenn. Ct. App. Mar. 8, 2021).

81. Savings Statute.

Trial court properly ruled that a church's 2019 complaint against a lending institution was barred by the statutes of limitation and the savings statute because the complaint was not filed within one year from the date the church's initial complaint was dismissed; the statute of limitations for the lending institution's breach of contract and fraud claims had run by the time the church filed its complaint, and as a result, the church's nonsuit of its 2018 lawsuit operated as a dismissal on the merits of those claims. *Mount Hopewell Missionary Baptist Church v. Found. Capital Res.*, — S.W.3d —, 2021 Tenn. App. LEXIS 39 (Tenn. Ct. App. Feb. 4, 2021).

28-1-106. Accrual of right if person under eighteen years of age, adjudicated incompetent, or lacking capacity.

NOTES TO DECISIONS**ANALYSIS**

12. Computation of Period.
22. Persons of Unsound Mind.

12. Computation of Period.

Plaintiff was 17 years old at the time he allegedly suffered his injuries, and he had up until his nineteenth birthday to commence an action related to his alleged injury; while he timely filed an action against the company in August 2017, he did not amend his complaint to add the successor company until July 30, 2018, and because his original pre-suit notice only applied to the company, it did not extend the time to file suit against the successor company for 120 days beyond the statute of limitations.

His amended complaint was untimely. *Waller v. Varangon Corp.*, — S.W.3d —, 2021 Tenn. App. LEXIS 36 (Tenn. Ct. App. Feb. 2, 2021).

22. Persons of Unsound Mind.

Probate court properly awarded a trustee summary judgment based on the expiration of the statute of limitations in a dispute over the conveyance of real property held in a testamentary trust because the statute of limitations was not tolled as the decedent was of sound mind when the cause of action accrued in that no facts were presented to demonstrate the decedent's incapacity during the relevant time. *In re Conservatorship of Cross*, — S.W.3d —, 2020 Tenn. App. LEXIS 449 (Tenn. Ct. App. Oct. 9, 2020).

28-1-110. Suspension pending administration of estate.**NOTES TO DECISIONS****ANALYSIS**

4. Suits Against Personal Representative.
7. —Periods of Suspension.
4. **Suits Against Personal Representative.**
7. **—Periods of Suspension.**

Statute of limitations commenced from the date of the automobile accident, and upon de-

cedent's death, the statute was tolled; because no personal representative was appointed during the six-month period after decedent's death, the statute of limitations began running again. Plaintiff did not substitute the administrator as the proper party before expiration of the statute of limitations and thus failed to strictly follow the survival statute, which was fatal to his action. *Mott v. Luethke*, — S.W.3d —, 2021 Tenn. App. LEXIS 98 (Tenn. Ct. App. Mar. 16, 2021).

CHAPTER 3**LIMITATION OF ACTIONS OTHER THAN REAL****PART 1 MISCELLANEOUS LIMITATIONS****28-3-103. Slander actions.****NOTES TO DECISIONS****2. Pleading of Limitation Period.**

Given the six-month statute of limitations that applies to slander claims, all alleged communications sought to be injected into the suit by way of an amended complaint were time-barred when plaintiff filed his motion to amend.

The trial court's denial of plaintiff's motion to amend was therefore affirmed. *Maize v. Friendship Cmty. Church, Inc.*, — S.W.3d —, 2020 Tenn. App. LEXIS 463 (Tenn. Ct. App. Oct. 19, 2020).

28-3-104. Personal tort actions; actions against certain professionals.**NOTES TO DECISIONS****ANALYSIS**

21. Personal Injuries.
28. —Running of Statute.
48. Action by Client Against Attorney.
49. —Legal Malpractice Discovery Rule.
57. Medical Malpractice.
60. Civil Rights.

21. Personal Injuries.**28. —Running of Statute.**

Trial court did not err by finding that this section was applicable to extend the statute of limitations for plaintiff's personal injury action to two years due to defendant's traffic citation for failure to exercise due care, and therefore the trial court did not err by denying defendant's motion for summary judgment, because the traffic citation issued to defendant, which had been prepared, accepted, and the original citation filed with the court, was a criminal

charge and a criminal prosecution by a law enforcement officer. *Younger v. Okbahhanes*, — S.W.3d —, 2021 Tenn. App. LEXIS 33 (Tenn. Ct. App. Jan. 29, 2021).

Statute of limitations commenced from the date of the automobile accident, and upon decedent's death, the statute was tolled; because no personal representative was appointed during the six-month period after decedent's death, the statute of limitations began running again. Plaintiff did not substitute the administrator as the proper party before expiration of the statute of limitations and thus failed to strictly follow the survival statute, which was fatal to his action. *Mott v. Luethke*, — S.W.3d —, 2021 Tenn. App. LEXIS 98 (Tenn. Ct. App. Mar. 16, 2021).

Statute of limitations barred plaintiff's claims against the other driver because the cause of action accrued on the date of the accident, October 9, 2018, the statute of limitations began to run on October 10, 2018 and

expired on October 9, 2019, but plaintiff filed her amended civil warrant adding the other driver as a defendant on October 11, 2019, which was one year and two days after the accident and two days after the statute of limitations had run. *Haywood v. Trexis Ins. Corp.*, — S.W.3d —, 2021 Tenn. App. LEXIS 148 (Tenn. Ct. App. Apr. 12, 2021).

48. Action by Client Against Attorney.

49. —Legal Malpractice Discovery Rule.

Client's malpractice action against the attorney was untimely under the one-year statute of limitations for legal malpractice actions; client suffered legally cognizable damage in 2012 when it was forced to respond to the attorney's demand to cure a previous breach, not in 2013 when client was forced to vacate the premises. Client received the attorney's letters and client's counsel responded with an explanation of client's ongoing efforts to resolve the issue, which satisfied the actual injury requirement. *Outpost Solar, LLC v. Henry, Henry & Underwood, P.C.*, — S.W.3d —, 2021 Tenn. App. LEXIS 103 (Tenn. Ct. App. Mar. 17, 2021).

57. Medical Malpractice.

In a health care liability claim against a hospital, the hospital was vicariously liable for injuries the patient suffered as a result of the

anesthesia providers' conduct because, the patient's complaint filed on September 5, 2017, was timely pursuant to the 120-day extension of the statute of limitations as the statute of limitations began to run on the date of the patient's surgery, May 8, 2016; and the hospital and its registered agent received pre-suit notice on May 8 and 9, 2017. *Gardner v. St. Thomas Midtown Hosp.*, — S.W.3d —, 2021 Tenn. App. LEXIS 135 (Tenn. Ct. App. Apr. 1, 2021).

In a health care liability, plaintiff's complaint filed on May 6, 2019, was timely because pre-suit notice was provided to the hospital, thereby extending by 120 days the statute of limitations applicable to it; and the statute of limitations began to run on the date of the patient's death, January 12, 2018. *Ultsch v. HTI Mem. Hosp. Corp.*, — S.W.3d —, 2021 Tenn. App. LEXIS 136 (Tenn. Ct. App. Apr. 1, 2021).

60. Civil Rights.

Defendants were properly granted summary judgment on plaintiff's § 1983 Fourth Amendment false arrest and imprisonment claim challenging his initial detention and arrest because whether measured from date of bond hearing or date of indictment, applicable one-year statute of limitations under Tennessee law had long run when plaintiff sued. *Dibrell v. City of Knoxville*, ___ F.3d ___, 2021 U.S. App. LEXIS 459, 2021 FED App. 8P (6th Cir. Jan. 8, 2021).

28-3-105. Property tort actions — Statutory liabilities.

NOTES TO DECISIONS

ANALYSIS

2. Property Tort Actions.
18. —Actions Outside Statute.
22. —Breach of Contract.
54. Concealment of Cause of Action.
65. Products Liability.

2. Property Tort Actions.

Trial court properly ruled that a church's 2019 complaint against a lending institution was barred by the statutes of limitation and the savings statute because the complaint was not filed within one year from the date the church's initial complaint was dismissed; the statute of limitations for the lending institution's breach of contract and fraud claims had run by the time the church filed its complaint, and as a result, the church's nonsuit of its 2018 lawsuit operated as a dismissal on the merits of those claims. *Mount Hopewell Missionary Baptist Church v. Found. Capital Res.*, — S.W.3d —, 2021 Tenn. App. LEXIS 39 (Tenn. Ct. App. Feb. 4, 2021).

18. —Actions Outside Statute.

22. —Breach of Contract.

Trial court properly granted a widow's motion to dismiss an estate's complaint because the claims for rescission and for unjust enrichment and/or resulting trust were time-barred; the statute of limitations expired long before the decedent's death because the claims accrued immediately upon or shortly after the deed was executed, and the widow immediately breached, and continued to breach for the next 28 years, her contractual duties. In re *Estate of Cowan*, — S.W.3d —, 2020 Tenn. App. LEXIS 384 (Tenn. Ct. App. Aug. 25, 2020).

54. Concealment of Cause of Action.

Chancery court properly awarded a widow a judgment for the excess cash from the sale of the decedent's business and prejudgment interest based on the fraudulent concealment and conversion of the decedent's companies by the decedent's father, as executor, because the father and/or his attorney were silent about, fraudulently concealed, or misrepresented sev-

eral material facts surrounding the father's purchase of the companies, which tolled the running of the statute of limitations, and, even in exercising reasonable diligence, the widow could not have discovered the cause of action. *Coffey v. Coffey*, — S.W.3d —, 2020 Tenn. App. LEXIS 473 (Tenn. Ct. App. Oct. 26, 2020).

65. Products Liability.

Because plaintiff did not file the third products liability action within one year after the

federal court dismissed her first action ? the only lawsuit filed within the statutory limitations period ? the trial court correctly dismissed it as untimely filed, and was not saved by the saving statute, T.C.A. § 28-1-105(a). *Conine v. Medtronic Sofamor Danek USA, Inc.*, — S.W.3d —, 2021 Tenn. App. LEXIS 86 (Tenn. Ct. App. Mar. 8, 2021).

28-3-109. Rent — Official misconduct — Contracts not otherwise covered — Title insurance — Demand notes.

NOTES TO DECISIONS

ANALYSIS

3. Actions on Contracts.
32. —Running of Statute.
63. Actions Involving Land.
65. —Use and Occupation.
73. Accrual of Action.

3. Actions on Contracts.

32. —Running of Statute.

Trial court properly ruled that a church's 2019 complaint against a lending institution was barred by the statutes of limitation and the savings statute because the complaint was not filed within one year from the date the church's initial complaint was dismissed; the statute of limitations for the lending institution's breach of contract and fraud claims had run by the time the church filed its complaint, and as a result, the church's nonsuit of its 2018 lawsuit operated as a dismissal on the merits of those claims. *Mount Hopewell Missionary Baptist Church v. Found. Capital Res.*, — S.W.3d —, 2021 Tenn. App. LEXIS 39 (Tenn. Ct. App. Feb. 4, 2021).

63. Actions Involving Land.

Trial court properly granted a widow's motion to dismiss an estate's complaint because

the claims for rescission and for unjust enrichment and/or resulting trust were time-barred; the statute of limitations expired long before the decedent's death because the claims accrued immediately upon or shortly after the deed was executed, and the widow immediately breached, and continued to breach for the next 28 years, her contractual duties. *In re Estate of Cowan*, — S.W.3d —, 2020 Tenn. App. LEXIS 384 (Tenn. Ct. App. Aug. 25, 2020).

65. —Use and Occupation.

Appellants' statute of limitations defense was waived as appellants raised the defense for the first time on appeal rather than before the trial court. *Kirby Parkway Prof'l Condo. Ass'n v. Cindy-Jarvis Ltd. L.P.*, — S.W.3d —, 2020 Tenn. App. LEXIS 598 (Tenn. Ct. App. Dec. 30, 2020).

73. Accrual of Action.

There were at least disputed issues of material fact as to when the alleged breach occurred; therefore, a genuine issue of material fact existed as to when plaintiffs' cause of action accrued that precluded summary judgment on the statute of limitations issue. *Story v. Meadows*, — S.W.3d —, 2020 Tenn. App. LEXIS 591 (Tenn. Ct. App. Dec. 22, 2020).

28-3-110. Actions on public officers' and fiduciary bonds — Actions not otherwise covered — Affidavit of conviction and civil judgment.

NOTES TO DECISIONS

27. Deeds.

Trial court properly granted a widow's motion to dismiss an estate's complaint because the claims for rescission and for unjust enrichment and/or resulting trust were time-barred;

the statute of limitations expired long before the decedent's death because the claims accrued immediately upon or shortly after the deed was executed, and the widow immediately breached, and continued to breach for the next

28 years, her contractual duties. In re Estate of Cowan, — S.W.3d —, 2020 Tenn. App. LEXIS 384 (Tenn. Ct. App. Aug. 25, 2020).

TITLE 29

REMEDIES AND SPECIAL PROCEEDINGS

CHAPTER 9

CONTEMPT OF COURT

29-9-102. Scope of power.

NOTES TO DECISIONS

ANALYSIS

11. Procedure and Practice.
16. —Contempt Order Improper.

11. Procedure and Practice.

16. —Contempt Order Improper.

There was no evidence that any protected documents were leaked or that counsel distributed protected document to anyone other than the attorney, who was a qualified person under the terms of the protective order; they both retained the copies given to them within their offices, there was no contempt, and the trial court erred in holding otherwise. Doe ex rel. Doe v. Brentwood Acad., Inc., — S.W.3d —, 2020 Tenn. App. LEXIS 521 (Tenn. Ct. App. Nov. 20, 2020).

Attorney qualified as litigation support personnel and was not involved in providing substantive consultation on the legal aspects of the case; as such, the requirements pertaining to independent experts or independent consultants did not apply to the attorney, and there was no contempt and the trial court erred in holding otherwise. Doe ex rel. Doe v. Brentwood Acad., Inc., — S.W.3d —, 2020 Tenn. App. LEXIS 521 (Tenn. Ct. App. Nov. 20, 2020).

Counsel did ensure the attorney's attendance at the January 31 hearing by telling the person representing the attorney, while at the same time honoring the December 19 order to refrain from conferring directly with the attorney; as such, there was no contempt on this count and the trial court erred in holding otherwise. Doe ex rel. Doe v. Brentwood Acad., Inc., — S.W.3d

—, 2020 Tenn. App. LEXIS 521 (Tenn. Ct. App. Nov. 20, 2020).

Protective order did not define the type or extent of litigation support that litigation support personnel had to provide to be a qualified person under the order; there was no basis for the trial court's holding that the fact that the attorney's did not stamp documents, copy documents, or receive compensation for his work resulted in his being unqualified to receive protected documents under the order. There was no contempt and the trial court erred in holding otherwise. Doe ex rel. Doe v. Brentwood Acad., Inc., — S.W.3d —, 2020 Tenn. App. LEXIS 521 (Tenn. Ct. App. Nov. 20, 2020).

Nothing in the rules suggests that compensation is a requirement for an attorney licensed in another jurisdiction to provide legal services on a temporary basis in association with a Tennessee attorney, who is an active participant in the client's representation, as in this case; the attorney served as litigation support personnel for counsel within the scope of the Rules of Professional Conduct and was thus a qualified person under the protective order. There was no contempt and the trial court erred in holding otherwise. Doe ex rel. Doe v. Brentwood Acad., Inc., — S.W.3d —, 2020 Tenn. App. LEXIS 521 (Tenn. Ct. App. Nov. 20, 2020).

As the attorney testified that he returned all copies of the documents he received from counsel, the goal of the order, the return of protected documents provided by counsel, was satisfied; as such, there was no contempt and the trial court erred in holding otherwise. Doe ex rel. Doe v. Brentwood Acad., Inc., — S.W.3d —, 2020 Tenn. App. LEXIS 521 (Tenn. Ct. App. Nov. 20, 2020).

Counsel’s testimony was that based on the fact the attorney was included in the email sent to counsel, he was confident the attorney was in receipt of the protective order, and it was not believable that the attorney was not familiar with the terms of the order as he had sufficient knowledge of its contents to contest its entry; therefore, if counsel did fail to personally deliver a copy of the order to the attorney, his actions were not willful, there was no contempt, and the trial court erred in finding otherwise. Doe ex rel. Doe v. Brentwood Acad., Inc., — S.W.3d —, 2020 Tenn. App. LEXIS 521 (Tenn. Ct. App. Nov. 20, 2020).

Record did not support finding that counsel failed to maintain a log as required by the protective order, which did not elaborate on the format of the required log or mandate a timing requirement for when the log had to be prepared; counsel testified that his memo documenting receipt of protected documents was made at or near the time he received those documents. He complied with the log requirement, such that there was no contempt. Doe ex rel. Doe v. Brentwood Acad., Inc., — S.W.3d —, 2020 Tenn. App. LEXIS 521 (Tenn. Ct. App. Nov. 20, 2020).

CHAPTER 16
EMINENT DOMAIN

PART 1 GENERAL PROVISIONS

29-16-121. Preliminary surveys.

NOTES TO DECISIONS

18. Extension.

In a health care liability, plaintiff’s complaint filed on May 6, 2019, was timely because pre-suit notice was provided to the hospital, thereby extending by 120 days the statute of limitations applicable to it; and the statute of

limitations began to run on the date of the patient’s death, January 12, 2018. Ultsch v. HTI Mem. Hosp. Corp., — S.W.3d —, 2021 Tenn. App. LEXIS 136 (Tenn. Ct. App. Apr. 1, 2021).

CHAPTER 18
FORCIBLE ENTRY AND DETAINER

29-18-104. Unlawful detainer defined.

NOTES TO DECISIONS

ANALYSIS

- 1. Construction and Interpretation.
- 3. —Entering Under Contract Required.

1. Construction and Interpretation.

3. —Entering Under Contract Required.

Because a decedent’s widow did not occupy property pursuant to a landlord-tenant con-

tract but rather, remained on the property after the decedent’s death, the decedent’s son did not have a cause of action for unlawful detainer; therefore, the circuit court erred in awarding possession of the property to the son since it lacked subject matter jurisdiction. West v. West, — S.W.3d —, 2021 Tenn. App. LEXIS 156 (Tenn. Ct. App. Apr. 15, 2021).

CHAPTER 20

GOVERNMENTAL TORT LIABILITY

PART 2 REMOVAL OF IMMUNITY

29-20-201. General rule of immunity from suit — Exception.

NOTES TO DECISIONS

ANALYSIS

3. Abrogation of Immunity.
6. Liability of Municipal Corporation.
19. Applicability.

3. Abrogation of Immunity.

While T.C.A. § 29-20-201(b)(2) does not explicitly require a reckless disregard for the truth, gross negligence, as the minimum level of culpability required to remove immunity, has little distinction from a reckless disregard for the truth in the context of a defamation claim; while a private individual need only show simple negligence to recover for defamation; something far closer to a reckless disregard for the truth is required to remove immunity for statements that arise from legislative proceedings. *Moses v. Roland*, — S.W.3d —, 2021 Tenn. App. LEXIS 122 (Tenn. Ct. App. Mar. 25, 2021).

Both the Tennessee Governmental Tort Liability Act gross negligence standard and the reckless disregard of the truth standards speak in terms of the defendant recklessly disregarding the rights of others; in the context of determining whether immunity is removed for the tort of defamation, authority concerning the reckless disregard for the truth standard was helpful in determining whether the county commissioner committed at least gross negligence. *Moses v. Roland*, — S.W.3d —, 2021 Tenn. App. LEXIS 122 (Tenn. Ct. App. Mar. 25, 2021).

6. Liability of Municipal Corporation.

In a case in which plaintiff alleged that the city failed to adequately light a public park and neglected to make the park safe for walking at night, which caused her to fall and sustain severe personal injuries, the city was immune from suit under of the Governmental Tort Liability Act, and an exception to immunity did

not apply because the complaint failed to identify the public structure or improvement the city owned and controlled that was in a dangerous and defective condition; and it failed to allege that the city had constructive and/or actual notice of a dangerous or defective condition. *Clark v. City of Mt. Juliet*, — S.W.3d —, 2021 Tenn. App. LEXIS 95 (Tenn. Ct. App. Mar. 10, 2021).

19. Applicability.

County commissioner's statement that an individual who had pleaded guilty to stalking a judge was "threatening everybody" was not capable of a defamatory meaning because it was rhetorical hyperbole that could not be objectively proven or disproven; therefore, whether the commissioner was granted immunity under was irrelevant with regard to this particular statement. *Moses v. Roland*, — S.W.3d —, 2021 Tenn. App. LEXIS 122 (Tenn. Ct. App. Mar. 25, 2021).

There was no evidence that the county commissioner entertained any actual doubts concerning the truth of his statement that Homeland Security should watch an individual who had pleaded guilty to stalking a judge and was under restrictions regarding her entrance into two county buildings; there was no proof the commissioner acted with reckless disregard and thus his statement was cloaked with immunity under T.C.A. § 29-20-201(b)(2). *Moses v. Roland*, — S.W.3d —, 2021 Tenn. App. LEXIS 122 (Tenn. Ct. App. Mar. 25, 2021).

Evidence preponderated against the trial court's finding that the commissioner's comments about an individual did not arise from the conduct of the board, as the comments were made during regularly scheduled, open meetings and concerned the security of judges, given the individual's crime of stalking a judge. *Moses v. Roland*, — S.W.3d —, 2021 Tenn. App. LEXIS 122 (Tenn. Ct. App. Mar. 25, 2021).

29-20-203. Removal of immunity for injury from unsafe streets and highways — Notice required.

NOTES TO DECISIONS

3. Defective, Unsafe, or Dangerous Conditions.

In an action under the Governmental Tort Liability Act for personal injuries resulting from a trip and fall on the premises of a public school the trial court erred in granting defendant's motion to dismiss the complaint for failure to state a claim upon which relief could be granted because the complaint alleged suffi-

cient facts to articulate a claim for relief, including that defendant operated and controlled the school, there deteriorated sidewalk constituted a dangerous condition, and defendant knew or should have known about the dangerous condition. *Lawson v. Maryville City Sch.*, — S.W.3d —, 2020 Tenn. App. LEXIS 575 (Tenn. Ct. App. Dec. 14, 2020).

29-20-204. Removal of immunity for injury from dangerous structures — Exception — Notice required.

NOTES TO DECISIONS

10. Immunity Not Removed.

In a case in which plaintiff alleged that the city failed to adequately light a public park and neglected to make the park safe for walking at night, which caused her to fall and sustain severe personal injuries, the city was immune from suit under of the Governmental Tort Liability Act, and an exception to immunity did not apply because the complaint failed to iden-

tify the public structure or improvement the city owned and controlled that was in a dangerous and defective condition; and it failed to allege that the city had constructive and/or actual notice of a dangerous or defective condition. *Clark v. City of Mt. Juliet*, — S.W.3d —, 2021 Tenn. App. LEXIS 95 (Tenn. Ct. App. Mar. 10, 2021).

29-20-205. Removal of immunity for injury caused by negligent act or omission of employees — Exceptions — Immunity for year 2000 computer calculation errors.

NOTES TO DECISIONS

ANALYSIS

2. Public Duty Doctrine.
9. Civil Rights Claims.
25. Intentional Tort Exception.

2. Public Duty Doctrine.

Motorist did not plead facts sufficient to establish a special duty exception to the Public Duty Doctrine, as if the deputy owed a duty of care to warn about the tree that duty was to the public at large, and there was no indication that the motorist relied on anything the deputy did or said, as there was never any contact between them. The motorist failed to allege that the deputy engaged in reckless misconduct because at most he pleaded that the deputy breached a duty to the general public by leaving the scene of one downed tree to go to another. *Kimble v. Dyer Cty. Tenn.*, — S.W.3d —, 2020 Tenn. App. LEXIS 573 (Tenn. Ct. App. Dec. 16, 2020).

9. Civil Rights Claims.

Trial court did not err in dismissing a passenger's negligence complaint against an airport authority because it retained immunity under the civil rights exception; because the gravamen of the passenger's claim was that the officers used excessive force, i.e., failed to use reasonable force, given the circumstances, his claim that the officer's failed to supervise and train the officers was inextricably linked to a civil rights claim, and the civil rights exception applied. *Nichols v. Metro. Nashville Airport Auth.*, — S.W.3d —, 2021 Tenn. App. LEXIS 158 (Tenn. Ct. App. Apr. 15, 2021).

25. Intentional Tort Exception.

School system and school board were not entitled to immunity from suit on the basis of an intentional assault and battery where a teacher threw a shot put with the sole intention of demonstrating for the students how to properly throw it, and there was no evidence indicating otherwise. *Spearman v. Shelby Cty. Bd.*

of Educ., — S.W.3d —, 2021 Tenn. App. LEXIS 17 (Tenn. Ct. App. Jan. 15, 2021).

School system and school board were not entitled to immunity from suit on the basis of recklessness or gross negligence where a teacher distanced himself from the students,

instructed them to move back, and threw the shot put with less than full force Spearman v. Shelby Cty. Bd. of Educ., — S.W.3d —, 2021 Tenn. App. LEXIS 17 (Tenn. Ct. App. Jan. 15, 2021).

CHAPTER 21

HABEAS CORPUS

29-21-101. Grounds for writ.

NOTES TO DECISIONS

17. Petition Denied.

Defendant was not entitled to habeas corpus relief because the agreed upon sentence did not exceed the maximum punishment authorized for second degree murder. Furthermore, the

presentment in the case was not fatally defective so as to deprive the trial court of jurisdiction. Fernandez v. State, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 3 (Tenn. Crim. App. Jan. 6, 2021).

29-21-105. Place of application for writ.

NOTES TO DECISIONS

4. Compliance with Procedures Not Found.

Habeas corpus court properly summarily denied defendant's pro se petition because he did not establish delivery to the appropriate individual at the correctional facility within the time set for filing, he did not provide a reason

for filing his habeas corpus petition in the convicting court rather than the court closest in point of distance, and the interests of justice did not require a waiver of the untimely filing. McClenton v. Perry, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 118 (Tenn. Crim. App. Mar. 29, 2021).

29-21-109. Refusal of writ.

NOTES TO DECISIONS

3. Writ Denied.

Defendant was not entitled to habeas corpus relief because the agreed upon sentence did not exceed the maximum punishment authorized for second degree murder. Furthermore, the

presentment in the case was not fatally defective so as to deprive the trial court of jurisdiction. Fernandez v. State, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 3 (Tenn. Crim. App. Jan. 6, 2021).

CHAPTER 25

MANDAMUS

29-25-103. Court to which writ returnable.

NOTES TO DECISIONS

3. Chancery Court Jurisdiction.

Chancery court lacked subject matter jurisdiction to adjudicate a petition for a writ of mandamus compelling the Tennessee Department of Human Services to change its 2011 assessment score for a child care center where the office of the Department was statutorily

designated to be at the capitol, which was in another county, and under T.C.A. § 29-25-103, the writ was returnable in that county exclusively. The absence of any objection to the subsequent transfer was of no moment given the subject matter jurisdiction restrictions created by the localization of venue. Walker v.

Tenn. Dep't of Human Servs., — S.W.3d —, 2021 Tenn. App. LEXIS 9 (Tenn. Ct. App. Jan. 13, 2021).

CHAPTER 26

HEALTH CARE LIABILITY

PART 1 GENERAL PROVISIONS

29-26-101. Part definitions.

NOTES TO DECISIONS

ANALYSIS

3. Applicability.
7. Vicarious Liability.

3. Applicability.

Because the health care providers' alleged fraud vitiated the patient's consent, they did not have consent to provide any health care services to the patient, and a cause of action for the medical battery arose the moment an unlawful, offensive touching occurred. *Cooper v. Mandy*, — S.W.3d —, 2020 Tenn. App. LEXIS 510 (Tenn. Ct. App. Nov. 17, 2020).

Patient was entitled to proceed on her claims of intentional misrepresentation and civil conspiracy because the alleged misrepresentations made by the health care providers were inducements to engage in their services and were made prior to the existence of a patient-physician relationship, and therefore the claims were not related to the provision of health care services. *Cooper v. Mandy*, — S.W.3d —, 2020 Tenn. App. LEXIS 510 (Tenn. Ct. App. Nov. 17, 2020).

Trial court properly denied the health care providers' motion to dismiss the patient's husband's loss of consortium claim because it related to defendants' false representations and

not to a provision of, or a failure to provide, a health care service. *Cooper v. Mandy*, — S.W.3d —, 2020 Tenn. App. LEXIS 510 (Tenn. Ct. App. Nov. 17, 2020).

Although the hold placed on a hospital patient for further mental evaluation could potentially have been considered unrelated to the patient's presenting complaints of head and neck pain from an automobile accident, it still arose from the provision of health care services. Accordingly, the actions giving rise to the patient's claim of false imprisonment related to the provision of health care services and, therefore, required application of the Tennessee Health Care Liability Act, T.C.A. § 29-26-101 et seq. *Weakley v. Franklin Woods Cmty. Hosp.*, — S.W.3d —, 2020 Tenn. App. LEXIS 588 (Tenn. Ct. App. Dec. 22, 2020).

7. Vicarious Liability.

In a health care liability claim against a hospital, the hospital was vicariously liable for injuries the patient suffered as a result of the anesthesia providers' conduct because the hospital was subject to a claim for health care liability for the care provided by its agents and employees. *Gardner v. St. Thomas Midtown Hosp.*, — S.W.3d —, 2021 Tenn. App. LEXIS 135 (Tenn. Ct. App. Apr. 1, 2021).

29-26-115. Claimant's burden in health care liability action — Expert testimony — Presumption of negligence — Jury instructions.

NOTES TO DECISIONS

ANALYSIS

15. Summary Judgment.
18. Causation.

15. Summary Judgment.

Award of summary judgment to a doctor in a health care liability case was inappropriate because the surviving spouse presented suffi-

cient evidence through the deposition and affidavit of the surviving spouse's expert witness, at the summary judgment stage, to create a dispute of fact concerning alleged deviation by the doctor from the standard of care and causation of the decedent's death. *Davis v. Ellis*, — S.W.3d —, 2020 Tenn. App. LEXIS 493 (Tenn. Ct. App. Nov. 5, 2020).

18. Causation.

In a health care liability action, because the pharmacist's affidavit did not show how his education and experience as a pharmacist made him competent to opine as to the cause of the patient's stroke or to rule out other possible causes for her death, the pharmacist's causation proof was properly excluded, and summary judgment was properly granted to the pharmacy defendants on the claim that they caused the patient's death by failing to provide adequate instructions to her regarding the potentially dangerous and irreversible side effects of the prescribed drug. *Kidd v. Dickerson*, —

S.W.3d —, 2020 Tenn. App. LEXIS 443 (Tenn. Ct. App. Oct. 5, 2020).

Because the statute defining the practice of pharmacy does not contain a prohibition on making a medical diagnosis, it does not render a pharmacist ipso facto incompetent to express any opinion on causation for purposes of satisfying the statute regarding expert testimony in a health care liability action when the pharmacist's expert opinion is otherwise admissible and relevant. *Kidd v. Dickerson*, — S.W.3d —, 2020 Tenn. App. LEXIS 443 (Tenn. Ct. App. Oct. 5, 2020).

29-26-116. Statute of limitations — Counterclaim for damages.

NOTES TO DECISIONS

ANALYSIS

9. Actions Barred.

13. Miscellaneous.

9. Actions Barred.

Because there was substantial noncompliance with the statutory pre-suit notice requirement, the 120-day extension from the date of the expiration of the statute of limitations when proper pre-suit notice was provided was unavailable. Accordingly, dismissal of the complaint in the health care liability case was appropriate because the complaint was filed outside of the one-year limitation period applicable to health care liability claims. *Dial v. Klemis*, — S.W.3d —, 2020 Tenn. App. LEXIS 489 (Tenn. Ct. App. Nov. 2, 2020).

Plaintiffs' health care liability action was not timely filed against the hospital defendants because plaintiffs conceded that on October 31, 2017, the patient was informed that the doctor had malpositioned screws during the July 6, 2016, fusion surgery, and sent pre-suit notice to the doctor and his practice group on October 30, 2018; and plaintiffs had knowledge of facts as of October 31, 2017, which were sufficient as a matter of law to put a reasonable person on notice that the patient had suffered an injury

as a result of the wrongful conduct of the hospital defendants. *Karr v. St. Thomas Midtown Hosp.*, — S.W.3d —, 2021 Tenn. App. LEXIS 50 (Tenn. Ct. App. Feb. 10, 2021).

13. Miscellaneous.

In a health care liability claim against a hospital, the hospital was vicariously liable for injuries the patient suffered as a result of the anesthesia providers' conduct because, the patient's complaint filed on September 5, 2017, was timely pursuant to the 120-day extension of the statute of limitations as the statute of limitations began to run on the date of the patient's surgery, May 8, 2016; and the hospital and its registered agent received pre-suit notice on May 8 and 9, 2017. *Gardner v. St. Thomas Midtown Hosp.*, — S.W.3d —, 2021 Tenn. App. LEXIS 135 (Tenn. Ct. App. Apr. 1, 2021).

In a health care liability claim against a hospital, plaintiffs' complaint filed on May 6, 2019, was timely because pre-suit notice was provided to the hospital, thereby extending by 120 days the statute of limitations applicable to it; and the statute of limitations began to run on the date of the patient's death, January 12, 2018. *Ultsch v. HTI Mem. Hosp. Corp.*, — S.W.3d —, 2021 Tenn. App. LEXIS 136 (Tenn. Ct. App. Apr. 1, 2021).

29-26-118. Proving inadequacy of consent.

NOTES TO DECISIONS

2. Consent.

In a health care liability action, summary judgment was properly granted to defendant doctors on the informed consent claim as the deceased patient would have agreed to the treatment even if adequately informed of all

significant perils as she needed to be on the prescribed medication given her blood clotting issue, and it was reasonable to prescribe it. *Kidd v. Dickerson*, — S.W.3d —, 2020 Tenn. App. LEXIS 443 (Tenn. Ct. App. Oct. 5, 2020).

29-26-121. Claim for health care liability — Notice — Evidence of compliance — Limitations — Copies of medical records.**NOTES TO DECISIONS****ANALYSIS**

3. Requirements Not Satisfied.
4. Compliance Required.
15. Untimely Suit.
18. Extension.
22. Substantial Compliance.
25. Dismissal.
28. Hospital Authorities.
29. Vicarious Liability.

3. Requirements Not Satisfied.

Deceased patient's survivor did not substantially comply with the statutory pre-suit notice requirements because the survivor did not provide the health care providers with HIPAA authorizations allowing them to obtain medical records from the other providers being sent pre-suit notice, thereby denying each of the providers access to all of the available medical records. *Dial v. Klemis*, — S.W.3d —, 2020 Tenn. App. LEXIS 489 (Tenn. Ct. App. Nov. 2, 2020).

Although a patient argued that the pre-suit notice of a potential health care liability claim which the patient mailed to a long-term care facility's administrator at the long-term care facility's business address satisfied the statutory requirement of pre-suit notice of the claim to the long-term care facility, because pre-suit notice of the health care liability claim was mandatory and because the patient did not provide pre-suit notice of the claim to the facility, dismissal of the patient's complaint as to the facility was appropriate. *Webb v. Trevecca Ctr. for Rehab. & Healing, LLC*, — S.W.3d —, 2020 Tenn. App. LEXIS 504 (Tenn. Ct. App. Nov. 10, 2020).

In a health care liability action, although the physicians failed to comply with this statute, because plaintiff did not establish extraordinary cause sufficient to excuse compliance with the pre-suit notice requirements, and there was no remedy or penalty for noncompliance with this statute, the trial court did not abuse its discretion when it denied plaintiff's motions to amend based on futility. *Bidwell ex rel. Bidwell v. Strait*, — S.W.3d —, 2021 Tenn. LEXIS 9 (Tenn. Jan. 28, 2021).

4. Compliance Required.

Appellant's voluntary nonsuit of the initial complaint extinguished any pending health care liability claims against appellees and also abrogated the notice appellant sent them, and the filing of her second complaint was the institution of a new and independent action;

when appellant neglected to provide appellees with a new notice, she failed to strictly comply with the statute and the trial court's dismissal of her second complaint was proper. *Byington v. Reaves*, — S.W.3d —, 2021 Tenn. App. LEXIS 161 (Tenn. Ct. App. Apr. 20, 2021).

Appellant's initial complaint was subject to pre-suit notice regardless of whether the initial complaint alleged additional causes of action sounding outside health care liability; because appellant could not disclaim the pre-suit notice requirement in her initial complaint, which included health care liability claims, the notice she sent before filing the initial complaint applied only to that complaint. *Byington v. Reaves*, — S.W.3d —, 2021 Tenn. App. LEXIS 161 (Tenn. Ct. App. Apr. 20, 2021).

15. Untimely Suit.

Because there was substantial noncompliance with the statutory pre-suit notice requirement, the 120-day extension from the date of the expiration of the statute of limitations when proper pre-suit notice was provided was unavailable. Accordingly, dismissal of the complaint in the health care liability case was appropriate because the complaint was filed outside of the one-year limitation period applicable to health care liability claims. *Dial v. Klemis*, — S.W.3d —, 2020 Tenn. App. LEXIS 489 (Tenn. Ct. App. Nov. 2, 2020).

18. Extension.

Plaintiff was 17 years old at the time he allegedly suffered his injuries, and he had up until his nineteenth birthday to commence an action related to his alleged injury; while he timely filed an action against the company in August 2017, he did not amend his complaint to add the successor company until July 30, 2018, and because his original pre-suit notice only applied to the company, it did not extend the time to file suit against the successor company for 120 days beyond the statute of limitations. His amended complaint was untimely. *Waller v. Varangon Corp.*, — S.W.3d —, 2021 Tenn. App. LEXIS 36 (Tenn. Ct. App. Feb. 2, 2021).

In a health care liability claim against a hospital, the hospital was vicariously liable for injuries the patient suffered as a result of the anesthesia providers' conduct because, the patient's complaint filed on September 5, 2017, was timely pursuant to the 120-day extension of the statute of limitations as the statute of limitations began to run on the date of the patient's surgery, May 8, 2016; and the hospital and its registered agent received pre-suit notice on May 8 and 9, 2017. *Gardner v. St. Thomas*

Midtown Hosp., — S.W.3d —, 2021 Tenn. App. LEXIS 135 (Tenn. Ct. App. Apr. 1, 2021).

22. Substantial Compliance.

Trial court properly found that plaintiff failed to substantially comply with T.C.A. § 29-26-121(a)(2)(E) because the authorizations lacked a description of the purpose for disclosing and using plaintiff's records. *Woods v. Arthur*, — S.W.3d —, 2021 Tenn. App. LEXIS 114 (Tenn. Ct. App. Mar. 23, 2021).

Plaintiff argued that compliance with the content requirements in T.C.A. § 29-26-121(a)(2)(E) did not prejudice defendants because each independently possessed the relevant records, but plaintiff failed to meet his burden as he did not establish that the operative reports were the only relevant documents and the court had no way of knowing how the medical record would be evaluated by an expert witness or consultant. *Woods v. Arthur*, — S.W.3d —, 2021 Tenn. App. LEXIS 114 (Tenn. Ct. App. Mar. 23, 2021).

Plaintiff named one of his treating physicians as a provider being sent pre-suit notice, yet plaintiff did not send HIPAA compliant medical authorizations permitting defendants to obtain medical records from the treating physician, and the trial court properly found that plaintiff failed to substantially comply with the content requirements in T.C.A. § 29-26-121(a)(2). *Woods v. Arthur*, — S.W.3d —, 2021 Tenn. App. LEXIS 114 (Tenn. Ct. App. Mar. 23, 2021).

T.C.A. § 29-26-121(a)(2)(E) required that appellant provide appellees with HIPAA authorizations for the other nineteen medical providers who were given pre-suit notice. Because appellant failed to substantially comply with § 29-26-121, she was not entitled to the 120-day extension on the one-year statute of limitations applicable in this case. *Shaw v. Gross*, — S.W.3d —, 2021 Tenn. App. LEXIS 151 (Tenn. Ct. App. Apr. 13, 2021).

25. Dismissal.

Because the hold placed on a patient for further mental evaluation arose from the provision of health care services following an auto accident, the actions giving rise to the patient's claim of false imprisonment required application of the Tennessee Health Care Liability Act, T.C.A. § 29-26-101 et seq. Accordingly, because the patient failed to provide both pre-suit notice and a certificate of good faith, as was statutorily required, dismissal of the patient's health care liability complaint with prejudice was appropriate. *Weakley v. Franklin Woods Cmty. Hosp.*, — S.W.3d —, 2020 Tenn. App. LEXIS 588 (Tenn. Ct. App. Dec. 22, 2020).

Taking even the latest date by which appellant argued that her health care liability cause of action accrued, her action was filed more than one year later. Accordingly, although the appellate court relied on a different ground than was cited by the trial court in its order of dismissal, the appellate court nevertheless upheld the trial court's ultimate decision to dismiss appellant's complaint. *Shaw v. Gross*, — S.W.3d —, 2021 Tenn. App. LEXIS 151 (Tenn. Ct. App. Apr. 13, 2021).

28. Hospital Authorities.

29. Vicarious Liability.

In a health care liability claim against a hospital, the hospital was vicariously liable for injuries the patient suffered as a result of the anesthesia providers' conduct because the hospital was subject to a claim for health care liability for the care provided by its agents and employees. *Gardner v. St. Thomas Midtown Hosp.*, — S.W.3d —, 2021 Tenn. App. LEXIS 135 (Tenn. Ct. App. Apr. 1, 2021).

In health care liability cases in which a plaintiff chose to sue only the principal, with respect to the tolling of the statute of limitations, the Tennessee Health Care Liability Act (HCLA) provisions regarding pre-suit notice prevailed over the common law exception in the case law barring vicarious liability claims against a principal when the right of action against the agent was extinguished by operation of law because, when a statute conflicted with the common law, the statute prevailed; and the HCLA did not change the common law rule that a plaintiff could choose to sue the principal and not the agent. *Ultsch v. HTI Mem. Hosp. Corp.*, — S.W.3d —, 2021 Tenn. App. LEXIS 136 (Tenn. Ct. App. Apr. 1, 2021).

In health care liability cases in which a plaintiff chose to sue only the principal, with respect to the tolling of the statute of limitations, the Tennessee Health Care Liability Act (HCLA) provisions regarding pre-suit notice prevailed over the common law exception in the case law barring vicarious liability claims against a principal when the right of action against the agent was extinguished by operation of law because the statute prevailed over the common law; and the result was consistent with the HCLA's purposes. Thus, the patient's vicarious liability claims against the hospital were timely, although the statute of limitations had run on her direct claims against the anesthesia providers, because of the 120-day extension. *Gardner v. St. Thomas Midtown Hosp.*, — S.W.3d —, 2021 Tenn. App. LEXIS 135 (Tenn. Ct. App. Apr. 1, 2021).

29-26-122. Filing of certificate of good faith.**NOTES TO DECISIONS****ANALYSIS**

11. Dismissal.
16. Certificate of Good Faith Not Required.
17. Sanctions.

11. Dismissal.

Because the hold placed on a patient for further mental evaluation arose from the provision of health care services following an auto accident, the actions giving rise to the patient's claim of false imprisonment required application of the Tennessee Health Care Liability Act, T.C.A. § 29-26-101 et seq. Accordingly, because the patient failed to provide both pre-suit notice and a certificate of good faith, as was statutorily required, dismissal of the patient's health care liability complaint with prejudice was appropriate. *Weakley v. Franklin Woods Cmty. Hosp.*, — S.W.3d —, 2020 Tenn. App. LEXIS 588 (Tenn. Ct. App. Dec. 22, 2020).

16. Certificate of Good Faith Not Required.

Because the law was not clear at the time that the federal district court dismissed the

widow's FTCA complaint, the district court did not commit plain error by dismissing the complaint for failure to comply with the Tennessee Health Care Liability Act (THCLA). Specifically, when the district court dismissed the complaint, the law in the Sixth Circuit was far from clear that the THCLA's good-faith affidavit requirement should not have applied in federal court, and the widow's counsel conceded that she had not filed a certificate with the complaint. Thus, the district court did not err by dismissing the complaint with prejudice. *Brusch v. United States*, — F.3d —, 2020 FED App. 501N, 823 Fed. Appx. 409, 2020 U.S. App. LEXIS 27414 (6th Cir. Aug. 26, 2020).

17. Sanctions.

Doctor was not entitled to sanctions after the dismissal of a patient's claim in a health care liability action because the patient's certificate of good faith and its underlying written statement did not violate the law as the patient's attorney and the patient's expert witness acted in good faith in raising allegations of fault against the doctor. *Smith v. Outen*, — S.W.3d —, 2020 Tenn. App. LEXIS 448 (Tenn. Ct. App. Oct. 9, 2020).

CHAPTER 28**PRODUCTS LIABILITY ACTIONS****29-28-101. Short title.****NOTES TO DECISIONS****1. In General.**

Where a consumer filed a products liability lawsuit under the Tennessee Products Liability Act, alleging injuries resulting from a transvaginal mesh device, the consumer's claims were time-barred since the consumer's injuries occurred outside the applicable statute of re-

pose since she was first injured by the product when she had her first surgery to remove the eroded mesh, and not when she later discovered that the product caused the injuries. *Clabo v. Johnson & Johnson Health Care Sys., Inc.*, 982 F.3d 989, 2020 FED App. 379P, 2020 U.S. App. LEXIS 39041 (6th Cir. Dec. 14, 2020).

CHAPTER 38**DRUG DEALER LIABILITY ACT****29-38-103. Legislative findings.****NOTES TO DECISIONS****1. In General.**

If individuals could prove that drug companies intentionally participated in the illegal

drug market by facilitating the marketing or distribution of opioids, separate and distinct from the drug companies participation in the

legal drug market, then the legislatively created form of market liability applied to that conduct. *Effler v. Purdue Pharma L.P.*, —

S.W.3d —, 2020 Tenn. LEXIS 594 (Tenn. Dec. 17, 2020).

29-38-104. Chapter definitions.

NOTES TO DECISIONS

ANALYSIS

- 1. Applicability.
- 2. Participation in the Illegal Drug Market.

1. Applicability.

Plain meaning of the language of the Tennessee Drug Dealer Liability Act, T.C.A. §§ 29-38-101 to 29-38-116, suggests that it applies to a corporation that knowingly distributes or commits an act intended to facilitate the production, marketing, distribution or sale of opioids to a person who does not have a valid prescrip-

tion. *Effler v. Purdue Pharma L.P.*, — S.W.3d —, 2020 Tenn. LEXIS 594 (Tenn. Dec. 17, 2020).

2. Participation in the Illegal Drug Market.

Broad definition of “participation in the illegal drug market” in the Tennessee Drug Dealer Liability Act, T.C.A. §§ 29-38-101 to 29-38-116, included the alleged distribution and facilitation of the marketing or distribution of an illegal drug. *Effler v. Purdue Pharma L.P.*, — S.W.3d —, 2020 Tenn. LEXIS 594 (Tenn. Dec. 17, 2020).

29-38-105. Liability for participation in the illegal drug market — Exception for law enforcement in official investigations.

NOTES TO DECISIONS

ANALYSIS

- 1. Standing.
- 2. Cause of Action.

1. Standing.

District attorneys lacked standing to sue drug companies for the drug companies’ alleged knowing participation in the diversion of opioid medications for illegal use because the Tennessee Drug Dealer Liability Act, T.C.A. §§ 29-38-101 to 29-38-116, did not name the district attorneys as parties who could sue under the Act. The district attorneys were not serving as authorized counsel for any governmental entities, but as plaintiffs with retained counsel. *Effler v. Purdue Pharma L.P.*, — S.W.3d —, 2020 Tenn. LEXIS 594 (Tenn. Dec. 17, 2020).

2. Cause of Action.

Individuals, who alleged that they were harmed by exposure to opioids in utero, stated a claim against drug companies based on allegations of intentional and purposeful participation in the illegal opioid market because the individuals alleged that the companies knowingly and purposefully participated in the illegal drug market by deceptively and aggressively marketing their opioid medications, encouraging doctors to over-prescribe opioids, and over-supplying opioids for distribution in the counties where the individuals were exposed. *Effler v. Purdue Pharma L.P.*, — S.W.3d —, 2020 Tenn. LEXIS 594 (Tenn. Dec. 17, 2020).

29-38-106. Persons allowed to bring an action for damages — Persons against whom damages may be sought — What damages may be sought.

NOTES TO DECISIONS

ANALYSIS

- 1. In General.
- 2. Cause of Action.

1. In General.

District attorneys lacked standing to sue drug companies for the drug companies’ alleged knowing participation in the diversion of opioid

medications for illegal use because the Tennessee Drug Dealer Liability Act, T.C.A. §§ 29-38-101 to 29-38-116, did not name the district attorneys as parties who could sue under the Act. The district attorneys were not serving as authorized counsel for any governmental entities, but as plaintiffs with retained counsel. *Effler v. Purdue Pharma L.P.*, — S.W.3d —, 2020 Tenn. LEXIS 594 (Tenn. Dec. 17, 2020).

2. Cause of Action.

Individuals, who alleged that they were harmed by exposure to opioids in utero, stated

a claim against drug companies based on allegations of intentional and purposeful participation in the illegal opioid market because the individuals alleged that the companies knowingly and purposefully participated in the illegal drug market by deceptively and aggressively marketing their opioid medications, encouraging doctors to over-prescribe opioids, and over-supplying opioids for distribution in the counties where the individuals were exposed. *Effler v. Purdue Pharma L.P.*, — S.W.3d —, 2020 Tenn. LEXIS 594 (Tenn. Dec. 17, 2020).

29-38-109. Target communities for different offense levels.

NOTES TO DECISIONS

1. Target Community.

When individuals alleged that drug companies distributed millions of opioids throughout seven judicial districts encompassing numerous Tennessee counties, the alleged conduct and the quantity of opioids involved made this

a Level 4 offense so that the illegal drug market target community was the entire State of Tennessee. *Effler v. Purdue Pharma L.P.*, — S.W.3d —, 2020 Tenn. LEXIS 594 (Tenn. Dec. 17, 2020).

29-38-116. Representation by prosecuting attorney — Motion for stay of action during drug investigation or prosecution.

NOTES TO DECISIONS

1. In General.

District attorneys lacked standing to sue drug companies for the drug companies' alleged knowing participation in the diversion of opioid medications for illegal use because the Tennessee Drug Dealer Liability Act, T.C.A. §§ 29-38-101 to 29-38-116, did not name the district

attorneys as parties who could sue under the Act. The district attorneys were not serving as authorized counsel for any governmental entities, but as plaintiffs with retained counsel. *Effler v. Purdue Pharma L.P.*, — S.W.3d —, 2020 Tenn. LEXIS 594 (Tenn. Dec. 17, 2020).

CHAPTER 39

COMPENSATION FOR ECONOMIC AND NONECONOMIC DAMAGES

29-39-104. Punitive damages.

NOTES TO DECISIONS

2. Compliance.

Because a trial court did not conduct a bifurcated hearing on the amount of punitive damages, it was necessary to vacate the award of punitive damages and remand for further proceedings. The court was to enter a revised order regarding its decision to impose punitive damages from the evidence, clarifying whether it

found by clear and convincing evidence that a lessor acted intentionally, fraudulently, maliciously, or recklessly. If it did, the court was to hold an additional hearing as to the amount of punitive damages to be awarded, if any. *Hudson, Holeyfield & Banks, G.P. v. MNR Hosp., LLC*, — S.W.3d —, 2020 Tenn. App. LEXIS 358 (Tenn. Ct. App. Aug. 7, 2020).

TITLE 30
ADMINISTRATION OF ESTATES

CHAPTER.
1. EXECUTORS AND ADMINISTRATORS.

Part 3 Appointment by Chancery Court

CHAPTER 1
EXECUTORS AND ADMINISTRATORS

PART 3 APPOINTMENT BY CHANCERY COURT

SECTION.
30-1-301. Jurisdiction.

PART 1 GENERAL PROVISIONS

30-1-101. Letters testamentary or of administration required.

NOTES TO DECISIONS

ANALYSIS

- 1. Personal Representatives.
- 3. —Necessity for Appointment.

1. Personal Representatives.

3. —Necessity for Appointment.

Appellate court lacked jurisdiction to consider an appeal because, inter alia, neither a decedent's daughter nor an attorney satisfied

the statutory standing requirement since the decedent died more than nine months before the notice of appeal was filed, there was no evidence that an estate was opened for the decedent much less that her daughter obtained letters of administration or letters testamentary, and there was no indication that the attorney who filed the appeal represented the decedent at any point in the case. In re Estate of Lake, — S.W.3d —, 2020 Tenn. App. LEXIS 570 (Tenn. Ct. App. Dec. 15, 2020).

PART 3 APPOINTMENT BY CHANCERY COURT

30-1-301. Jurisdiction.

The chancery court of the county in which any person resided at the time of the decedent's death, or in which the decedent's estate, goods, and chattels or effects were at the time of the decedent's death, may appoint an administrator when six (6) months have elapsed from the death, and no person will apply or can be procured to administer on the decedent's estate.

History.

Code 1858, § 2209 (deriv. Acts 1841-1842, ch. 177, § 1); Shan., § 3943; Code 1932, § 8155; T.C.A. (orig. ed.), § 30-301.

Compiler's Notes. This section is set out in this Advance Code Service to correct the spelling of the second occurrence of "decedent's".

TITLE 31
DESCENT AND DISTRIBUTION
CHAPTER 1
GENERAL PROVISIONS

31-1-101. Title definitions.

NOTES TO DECISIONS

3. Issue.

Trial court's determination that a testator's great-grandchildren were not beneficiaries of the testator's estate was reversed because the will's plain language "includes" persons with a "parent-child relationship" to the person through whom [the] person claimed benefits

but did not exclude those who do not; by stating that "issue" included a person who had a parent-child relationship with the testator's children, the will did not exclude those who do not. In re Estate of Clifton, — S.W.3d —, 2021 Tenn. App. LEXIS 107 (Tenn. Ct. App. Mar. 18, 2021).

CHAPTER 2
INTESTATE SUCCESSION

31-2-103. Vesting of estate — Net estate.

NOTES TO DECISIONS

3. Illustrative Cases.

Property at issue vested in the decedent's designated heir when the personal representative executed warranty deeds for the property, despite the fact that the deeds were never recorded. The personal representative intended to transfer the property, to the extent the personal representative held any title as personal

representative of the estate, when the personal representative executed the deeds and advised the heir of the deeds, while the heir paid the expenses for the property and treated the property as the heir's own. In re Estate of Schubert, — S.W.3d —, 2020 Tenn. App. LEXIS 419 (Tenn. Ct. App. Sept. 18, 2020).

TITLE 32
WILLS
CHAPTER 1
EXECUTION OF WILLS

PART 2 REVOCATION

32-1-201. Actions effecting a revocation of will.

NOTES TO DECISIONS

1. Alterations.

There was insufficient evidence to support that the decedent made the markings on the will or that he intended to revoke those portions of the will, much less a revocation of the entire will, because the decedent had not de-

stroyed the last will and testament or written anything on it to reflect that he intended to revoke his last will and testament, nor had he executed a subsequent document revoking the January 2018 will; and no evidence was presented of any individual witnessing the dece-

dent make any markings on the will, of any person identifying the markings on the will as those of the decedent, or concerning whether the decedent made comments prior to his death

regarding revision of his will. In re Estate of Lewis, — S.W.3d —, 2020 Tenn. App. LEXIS 477 (Tenn. Ct. App. Oct. 28, 2020).

CHAPTER 3

CONSTRUCTION, OPERATION AND EFFECT

32-3-101. Operation of will.

NOTES TO DECISIONS

22. Construction of Will.

Trial court's determination that a testator's great-grandchildren were not beneficiaries of the testator's estate was reversed because the will's plain language "includes" persons with a "parent-child relationship" to the person through whom [the] person claimed benefits

but did not exclude those who do not; by stating that "issue" included a person who had a parent-child relationship with the testator's children, the will did not exclude those who do not. In re Estate of Clifton, — S.W.3d —, 2021 Tenn. App. LEXIS 107 (Tenn. Ct. App. Mar. 18, 2021).

TITLE 35

FIDUCIARIES AND TRUST ESTATES

CHAPTER 15

TENNESSEE UNIFORM TRUST CODE

PART 10 LIABILITY OF TRUSTEES AND RIGHTS OF PERSONS DEALING WITH TRUSTEE

35-15-1004. Attorney's fees and costs.

NOTES TO DECISIONS

3. Fees Properly Awarded.

Awarding of attorneys' fees to a trustee and the trustees' child in a dispute over the conveyance of real property held in a testamentary trust to the child was appropriate because (1) the action involved the administration of the trust; (2) the attorneys' fees were reasonable,

necessary, and properly supported by affidavit of counsel; and (3) justice and equity permitted the award. Furthermore, the estate of the decedent had sufficient funds to incur the attorneys' fees and expenses. In re Conservatorship of Cross, — S.W.3d —, 2020 Tenn. App. LEXIS 449 (Tenn. Ct. App. Oct. 9, 2020).

35-15-1005. Limitation of action for breach of trust against trustee, former trustee, trust advisor, or trust protector.

NOTES TO DECISIONS

1. Statute of Limitations.

Probate court properly awarded a trustee summary judgment based on the expiration of the statute of limitations in a dispute over the conveyance of real property held in a testamentary trust because the statute of limitations was not tolled as the decedent was of sound

mind when the cause of action accrued in that no facts were presented to demonstrate the decedent's incapacity during the relevant time. In re Conservatorship of Cross, — S.W.3d —, 2020 Tenn. App. LEXIS 449 (Tenn. Ct. App. Oct. 9, 2020).

TITLE 36

DOMESTIC RELATIONS

CHAPTER 1

ADOPTION

PART 1 GENERAL PROVISIONS

36-1-101. Purpose of part — Construction.

NOTES TO DECISIONS

10. Best Interests of the Child.

Juvenile court properly terminated a the father's parental rights as in the best interest of the children because he failed to manifest an ability and willingness to assume custody of the children and abandoned them by engaging in conduct that exhibited a wanton disregard for their welfare by engaging in a pattern of physical violence, domestic abuse, toward the mother and one of the children, as well as other illegal or unreasonable acts, the Department of Children's Services made reasonable efforts to reunite the father with the children, the children had no meaningful relationship with the father, and a change of caretaker and physical environment was likely to have a negative effect on the children's welfare. In re Nakayia, — S.W.3d —, 2020 Tenn. App. LEXIS 359 (Tenn. Ct. App. Aug. 7, 2020).

Evidence was sufficient to support the trial court's finding that termination of the father's parental rights was in the child's best interest because it showed that the father had been incarcerated since the child was three years old, the mother had stopped the video visits between them when the child began exhibiting anxiety behaviors after the visits, the child had no relationship with the father at the time of trial, and even after the father's release there would be restrictions on his being around other children due to his sex offender status. In re Jackson D., — S.W.3d —, 2020 Tenn. App. LEXIS 366 (Tenn. Ct. App. Aug. 17, 2020).

Evidence was sufficient to support the trial court's determination that termination of the

mother's parental rights was in the children's best interest because the mother failed to obtain suitable housing for herself and the children, despite the social services the mother received she was still barely able to function and care for herself let alone the children, and the mother's diagnoses of an intellectual disability and mood disorders will be lifelong struggles for her that could not be overcome with social services. In re Dyllon M., — S.W.3d —, 2020 Tenn. App. LEXIS 513 (Tenn. Ct. App. Nov. 18, 2020).

Termination of a father's parental rights was in the child's best interest because the teenage child had bonded with the foster family, the father and the child did not have a meaningful relationship, and the child had no desire to have a relationship with the father who was physically, emotionally, psychologically, and sexually abusive toward the child. In re Brandon H., — S.W.3d —, 2021 Tenn. App. LEXIS 38 (Tenn. Ct. App. Feb. 2, 2021).

Termination of a mother's parental rights was in the children's best interests because she had trouble maintaining a telephone, she did not know who her case worker was, she was engaged in abusive relationships, and despite the fact that the mother was given every opportunity to find an income-based home and to subsequently find a job, she stated she quit paying child support because she could not keep a job and could not keep a home. In re Jeremy C., — S.W.3d —, 2021 Tenn. App. LEXIS 72 (Tenn. Ct. App. Feb. 28, 2021).

36-1-102. Part definitions. [Effective until June 30, 2022. See version Effective on July 1, 2022.]

NOTES TO DECISIONS

ANALYSIS	
1.	Constitutionality of Definition.
5.	Abandoned Child.
7.	—Incarceration.
8.	—Suitable Home.
9.	—Support of Child.
10.	—Failure to visit.
12.	Legal Parent.
13.	Putative Father.

15. Termination of Parental Rights.
16. Determination of Abandonment.
17. Wanton Disregard.

1. Constitutionality of Definition.

While T.C.A. § 36-1-102(1), as amended in 2018, eliminates the willful component of the petitioning party's burden, it does not create an irrebuttable presumption that a parent's failure to support constitutes abandonment; instead, the statute leaves open an avenue by way of affirmative defense for a parent to establish that her failure to support was not willful. The statute is not obviously unconstitutional on its face. In *re Arianna B.*, — S.W.3d —, 2020 Tenn. App. LEXIS 499 (Tenn. Ct. App. Nov. 9, 2020).

5. Abandoned Child.

7. —Incarceration.

In a termination of parental rights action, due to the mother's 80-day incarceration, T.C.A. § 36-1-102(1)(A)(i) was not a proper ground for termination of her parental rights. Instead, § 36-1-102(1)(A)(iv) contained the applicable definition of abandonment but since this was not plead the juvenile court's finding of abandonment by the mother had to be reversed. In *re A.V.N.*, — S.W.3d —, 2020 Tenn. App. LEXIS 406 (Tenn. Ct. App. Sept. 10, 2020).

Trial court erred in terminating the father's parental rights based on abandonment because the trial court's order stated no findings with respect to abandonment during the relevant four months preceding the father's incarceration in November 2017. In *re Layton W.*, — S.W.3d —, 2020 Tenn. App. LEXIS 445 (Tenn. Ct. App. Oct. 6, 2020).

Trial court did not err by terminating the mother's parental rights based on abandonment by an incarcerated parent because her criminal history was extensive prior to her incarceration, her substance abuse caused the initial removal of the child from her custody, when she was given the opportunity for a trial home placement she squandered that opportunity by using drugs, her positive drug test led to her probation violation and subsequent incarceration, she failed to provide adequate support or supervision for the child, and she pleaded guilty to child neglect. In *re Brantley O.*, — S.W.3d —, 2020 Tenn. App. LEXIS 472 (Tenn. Ct. App. Oct. 22, 2020).

Termination of parental rights for incarcerated parents on the ground of abandonment by wanton disregard was appropriate because when the parents were not incarcerated the parents tested positive for illegal substances, failed to complete the permanency plan, failed to maintain regular visitation with the child, and ceased communication with the Tennessee Department of Children's Services prior to their incarceration. As a result, the parents

abandoned the child by engaging in conduct that exhibited a wanton disregard for the child's welfare. In *re Noah A.*, — S.W.3d —, 2020 Tenn. App. LEXIS 498 (Tenn. Ct. App. Nov. 6, 2020).

Trial court erred by terminating the father's parental rights based on abandonment by an incarcerated parent because it did not set out the correct four-month period so as to put the father on notice and the Tennessee Department of Children's Services withdrew the ground at trial. In *re Haskell S.*, — S.W.3d —, 2020 Tenn. App. LEXIS 515 (Tenn. Ct. App. Nov. 18, 2020).

Clear and convincing evidence supported the trial court's determination that the father abandoned the child because it showed that he had a long history of probation violations, criminal behavior, and substance abuse, and he did not contact DCS when he was released from prison even though he knew the child was in foster care. In *re Malachi M.*, — S.W.3d —, 2020 Tenn. App. LEXIS 527 (Tenn. Ct. App. Nov. 20, 2020).

Termination of a father's parental rights on the ground of abandonment by exhibiting a wanton disregard for the children's welfare was appropriate because the father was incarcerated during part of the four months immediately preceding the filing of the termination action, and, given the father's long criminal history, the father's incarceration was part of a broader pattern of conduct that rendered him unfit or posed a risk of substantial harm to the welfare of the child. In *re Brayden E.*, — S.W.3d —, 2020 Tenn. App. LEXIS 549 (Tenn. Ct. App. Dec. 4, 2020).

Mother's rights were properly terminated for abandonment by an incarcerated parent; she was incarcerated at the time of the termination petition's filing and had been incarcerated during all of the four months immediately preceding the filing, plus her repeated criminal behavior resulting in incarceration and her failure to take care of the child even when she was on parole demonstrated her wanton disregard for the child's welfare. In *re Malachi M.*, — S.W.3d —, 2021 Tenn. App. LEXIS 121 (Tenn. Ct. App. Mar. 25, 2021).

8. —Suitable Home.

Termination of the mother's parental rights was proper on the ground of abandonment by failure to provide a suitable home; despite services, the mother was unable to keep her home clean, as there was trash everywhere, one child came down with scabies, there were truancy issues, and the home was not free from domestic violence. In *re Cheyenne S.*, — S.W.3d —, 2020 Tenn. App. LEXIS 431 (Tenn. Ct. App. Sept. 24, 2020).

Termination of the mother's parental rights was proper based on abandonment because she failed to provide a suitable home for the child as she continued to use drugs, engage in criminal

activities, and live in an unsuitable home. In re Braden K., — S.W.3d —, 2020 Tenn. App. LEXIS 437 (Tenn. Ct. App. Sept. 30, 2020).

Tennessee Department of Children's Services established the ground for termination of parental rights of abandonment by failure to provide a suitable home by clear and convincing evidence because the mother failed to follow through with the Department's recommendations, did not have a suitable home or transportation, failed to provide an accurate address for a home, and got into an abusive relationship. A year after the removal of the child from the home, the mother remained homeless and continued to have substance abuse issues. In re Meghan M.R., — S.W.3d —, 2020 Tenn. App. LEXIS 457 (Tenn. Ct. App. Oct. 16, 2020).

Termination of parental rights for abandonment by failure to provide a suitable home was appropriate because the child was removed from the parents' home as the parents and the child were living in paternal grandparents' home. The parents also did not make reasonable efforts to provide the child with a home that was free of drugs and the parents' actions following the removal demonstrated a lack of concern for the welfare of the child such that it is unlikely that the parents would have been able to provide a suitable home at an early date. In re Noah A., — S.W.3d —, 2020 Tenn. App. LEXIS 498 (Tenn. Ct. App. Nov. 6, 2020).

Termination of the mother's parental rights was proper based on abandonment by failure to provide a suitable home because she was not able to establish a home to which the children could safely return due to her lack of parenting skills and inattentiveness to the children's needs; she did not always actively participate or implement parenting skills during the visitation she was provided; she did not provide documentation concerning a mental health assessment or continued counseling; and she never progressed to the point of having unsupervised visitation with the children. In re Treymarion S., — S.W.3d —, 2020 Tenn. App. LEXIS 599 (Tenn. Ct. App. Dec. 30, 2020).

Termination ground of failure to establish a suitable home was established in this case; the child had been removed from the mother by court order in 2018 and reasonable efforts over 20 months had been made by the department to help the mother establish a suitable home, including providing housing resources and referrals for mental health assessments, yet the mother failed to follow recommendations for mental health treatment and resided in various facilities that did not allow children. In re Dominic B., — S.W.3d —, 2021 Tenn. App. LEXIS 77 (Tenn. Ct. App. Mar. 3, 2021).

Termination ground of failure to establish a suitable home was established in this case; the child had been removed from the mother by court order in 2018 and reasonable efforts over 20 months had been made by the department to

help the mother establish a suitable home, including providing housing resources and referrals for mental health assessments, yet the mother failed to follow recommendations for mental health treatment and resided in various facilities that did not allow children. In re Dominic B., — S.W.3d —, 2021 Tenn. App. LEXIS 77 (Tenn. Ct. App. Mar. 3, 2021).

Termination petition alleged only one ground for the termination of father's parental rights, abandonment by failure to financially support the child; based on the relevance of the findings to the best interest analysis and the trial court's reliance on the petition, the court disagreed that the trial court terminated the father's parental rights based on the ground of abandonment by failure to provide a suitable home. In re Leilynn S., — S.W.3d —, 2021 Tenn. App. LEXIS 100 (Tenn. Ct. App. Mar. 16, 2021).

Trial court did not err by terminating the parents' rights based on abandonment by failure to establish a suitable home because the evidence showed that the father was incarcerated at the time of trial and the mother testified that she was staying with a friend in a camper but she did not know who owned it. In re Adaleigh M., — S.W.3d —, 2021 Tenn. App. LEXIS 130 (Tenn. Ct. App. Mar. 31, 2021).

9. —Support of Child.

Mother and stepfather failed to prove by clear and convincing evidence that the father willfully failed to pay support because they presented no wage statements or other evidence of the father's employment during the relevant four-month period, emails suggested that he was in treatment for alcohol addiction for part of that time, and the father's lack of employment and income was supported by his bank and credit union records. In re Mattie L., — S.W.3d —, 2020 Tenn. App. LEXIS 599 (Tenn. App. 8, 2021).

Evidence was less than clear that the father abandoned his child by the willful failure to pay support; the father testified credibly that he sent checks every month for the child to his attorney, which was reasonable as a restraining order instructed the father to refrain from all contact with the mother, and the father, a convicted felon on supervised release, wanted to avoid any possibility of violating the order, plus the father's attorney acknowledged that it was error on his part in not forwarding the money. In re Austin J., — S.W.3d —, 2020 Tenn. App. LEXIS 107 (Tenn. Ct. App. Mar. 13, 2020).

Termination of the mother's parental rights was proper based on abandonment for willful failure to visit and to support because, although the father had relocated to Tennessee and lived with his parents, the mother knew his email address and his parent's physical address; and, when the mother had disposable income, and had the ability to pay support, she chose not to.

In re Aiden M., — S.W.3d —, 2020 Tenn. App. LEXIS 361 (Tenn. Ct. App. Aug. 11, 2020).

Termination of the mother's parental rights was proper based on abandonment because the mother did not provide support for the child from December 11, 2018 to April 10, 2019; she received the initial custody order that stated she had a duty to provide support for the child; she was reminded of that duty when she would attend court proceedings before the juvenile court or meetings with the family service worker; each permanency plan stated she was responsible for paying child support; and the mother provided no justifiable excuse for failing to provide support. In re Braden K., — S.W.3d —, 2020 Tenn. App. LEXIS 437 (Tenn. Ct. App. Sept. 30, 2020).

Burden was on the mother to prove her failure to support was not willful, which she failed to do; in the interim between the child entering petitioner's custody to petitioner being designated the new payee on the child's social security benefits, the mother never passed any of the benefits to petitioner for the child's benefit, plus a photograph of a belt and gifts that never were delivered was not child support. The ground of failure to support was proven by clear evidence, supporting termination of the mother's rights. In re Arianna B., — S.W.3d —, 2020 Tenn. App. LEXIS 499 (Tenn. Ct. App. Nov. 9, 2020).

Trial court correctly found that the father abandoned the child by failing to provide support because the father knew he had an obligation to support the child, was able to work pre-incarceration, and knew how to contact the foster parents but provided the child with no more than token support during the relevant four-month period; given the father's testimony of his ability to work in multiple capacities, there was no justification for his failure to support the child financially. In re Brooklyn R., — S.W.3d —, 2020 Tenn. App. LEXIS 506 (Tenn. Ct. App. Nov. 13, 2020).

Termination ground of abandonment by failure to support was proven against the father by clear and convincing evidence; in view of his \$90 per month cigarette budget, his failure to pay \$50 per month in child support was baffling, plus he testified that he was able to work and earn a living, such that his deficient support payments constituted only token support for the child. In re Ryan J. H., — S.W.3d —, 2020 Tenn. App. LEXIS 582 (Tenn. Ct. App. Dec. 22, 2020).

Father's failure to support the child was willful, and therefore the trial court properly found that the mother and stepfather met their burden of proving abandonment by failure to support, because by his own testimony the father's attempts to support the child were token at best and it would be incorrect to say that the mother thwarted the father's attempts at support because these attempts were spo-

radic and the funds offered were insignificant and made only when the father felt compelled. In re Ella H., — S.W.3d —, 2021 Tenn. App. LEXIS 12 (Tenn. Ct. App. Jan. 13, 2021).

Trial court properly found that the mother abandoned the child because she did not show any proof of her compliance with her alcohol and drug treatment, she admitted using methamphetamine for six months, and she was able to work, but she paid no child support nor did she provide any necessary items for the child. In re Hadley R., — S.W.3d —, 2021 Tenn. App. LEXIS 61 (Tenn. Ct. App. Feb. 21, 2021).

Termination of a mother's parental rights to the mother's child on the grounds of abandonment by failure to support because there was sufficient evidence to support the trial court's findings that the mother abandoned the child by failing to provide support to the child during the relevant four-month period. Furthermore, the mother failed to meet the mother's burden to show that the mother's failure to do so was not willful. In re Lucas S., — S.W.3d —, 2021 Tenn. App. LEXIS 67 (Tenn. Ct. App. Feb. 26, 2021).

Trial court did not err in terminating the father's parental rights for abandonment by failure to financially support the child; trial court correctly determined that T.C.A. § 36-1-102(1)(A)(iv) applied, aggregated the father's non-incarceration time prior to the filing of the petition, and found that he had not paid any child support in the 127 days that he had been out of jail prior to the petition's filing. In re Leilynn S., — S.W.3d —, 2021 Tenn. App. LEXIS 100 (Tenn. Ct. App. Mar. 16, 2021).

Parental termination ground of abandonment by failure to support was proven as the mother willfully failed to support the children; she was aware of her duty to support her children and had the ability to pay some support, but chose to prioritize other expenditures. In re Hayden F., — S.W.3d —, 2021 Tenn. App. LEXIS 119 (Tenn. Ct. App. Mar. 24, 2021).

10. —Failure to visit.

Mother and stepfather failed to prove by clear and convincing evidence that the father willfully failed to visit because his lack of visitation from during the relevant four-month period resulted from coercion, the mother's refusal to allow visitation unless the father paid support. In re Mattie L., — S.W.3d —, 2020 Tenn. LEXIS 599 (Tenn. Feb. 8, 2021).

Tennessee Department of Children's Services established the ground for termination of parental rights of abandonment by failure to visit by clear and convincing evidence because the mother, who was not in jail or incapacitated in any way, did not visit the child during the four months prior to the filing of the petition for termination of parental rights. Furthermore, the mother did not meet the mother's burden to prove at trial that the mother's failure to visit

the child was not willful. In re Meghan M.R., — S.W.3d —, 2020 Tenn. App. LEXIS 457 (Tenn. Ct. App. Oct. 16, 2020).

Trial court did not err in terminating the mother's parental rights to the child based on her failure to visit the child during the determinative period because the mother did not establish lack of willfulness of an affirmative defense, as the father's demands that she provide documentation of a clean drug screen and some type of mental health assessment prior to resumption of supervised visitation were aligned with the requirements in the juvenile court's order and the record revealed no indication that the father ever prevented the mother from providing the juvenile court or him with documentation of compliance with the order. In re Jude M., — S.W.3d —, 2020 Tenn. App. LEXIS 469 (Tenn. Ct. App. Oct. 22, 2020).

Trial court's finding of abandonment by failure to visit was proven by clear and convincing evidence because a father engaged in no more than token visitation with the child; the father visited the child at most three times during the relevant four-month period, he had no justifiable excuse for his failure to visit the child less than a handful of times, and there was no proof as to why he failed to visit more often. In re Brooklyn R., — S.W.3d —, 2020 Tenn. App. LEXIS 506 (Tenn. Ct. App. Nov. 13, 2020).

Termination of a father's parental rights on the ground of abandonment for failure to visit was appropriate because the father did not attempt to contact the children and disappeared for months at a time. Furthermore, the father did not challenge no-contact order based on the father's continued noncompliance with the permanency plan until when the father filed a motion for visitation, and the father's frequent incarcerations did not prevent the father from contacting the children. In re Brayden E., — S.W.3d —, 2020 Tenn. App. LEXIS 549 (Tenn. Ct. App. Dec. 4, 2020).

Father's failure to visit the child was willful, and therefore the trial court properly found that the mother and stepfather met their burden of proving abandonment by failure to visit, because the record showed he never made a genuine effort to visit the child. The father would not commit to the mother's reasonable request of establishing a consistent visitation schedule and there was no explanation as to why he failed to pursue visitation despite ample opportunity to do so. In re Ella H., — S.W.3d —, 2021 Tenn. App. LEXIS 12 (Tenn. Ct. App. Jan. 13, 2021).

Trial court erred in finding that the mother abandoned the child by failure to visit; although she only visited for a total of five hours, it was not token, as one of her visits was unexpectedly cut short by the father, and the mother's two other attempts to visit were declined by the father. Furthermore, there was communication between the mother and the

child, including five set of texts instigated by the mother and three sets instigated by either the child or the father and stepmother. In re Brianna B., — S.W.3d —, 2021 Tenn. App. LEXIS 31 (Tenn. Ct. App. Feb. 2, 2021).

Termination of a mother's parental rights to the mother's child on the grounds of abandonment by failure to visit was appropriate because there was sufficient evidence to support the trial court's findings that the mother abandoned the child by failing to visit the child during the relevant four-month period. Furthermore, the mother failed to meet the mother's burden to show that the mother's failure to do so was not willful. In re Lucas S., — S.W.3d —, 2021 Tenn. App. LEXIS 67 (Tenn. Ct. App. Feb. 26, 2021).

Mother established by a preponderance of the evidence that her failure to visit was not willful and thus the court reversed the finding that the parental termination ground of abandonment by willful failure to visit was proven; although the mother could have made a greater effort, the evidence supported a finding that the father significantly interfered, as he hid his new address from her, refused to communicate with her unless the conversation was refereed, and rebuffed some of her attempts at visitation. In re Hayden F., — S.W.3d —, 2021 Tenn. App. LEXIS 119 (Tenn. Ct. App. Mar. 24, 2021).

12. Legal Parent.

Aunt and uncle were not the child's guardians within the meaning of the adoption statute and thus they were not necessary parties to the adoption proceeding, which was not void; aunt and uncle were never appointed or defined by law as the child's guardian or conservator, given that the juvenile court's order only awarded them visitation with the child, while the grandparents were awarded temporary legal custody. In re M.L.S., — S.W.3d —, 2020 Tenn. App. LEXIS 458 (Tenn. Ct. App. Oct. 16, 2020).

Legal parent who signed a voluntary acknowledgment of paternity (VAP) was properly ordered to pay child support, although the legal parent was not the biological father of the child, because the legal parent failed to prove the existence of a material mistake of fact that would have warranted rescission of the VAP and ordering the legal parent to pay child support was consistent with public policy. State ex rel. Kimberly C. v. Gordon S., — S.W.3d —, 2020 Tenn. App. LEXIS 541 (Tenn. Ct. App. Nov. 30, 2020).

13. Putative Father.

Father was the putative, rather than the legal, father of the child because the DNA test results do not appear in the record, nor is there an order regarding parentage or a voluntary acknowledgment of paternity. In re Tiffany B.,

— S.W.3d —, 2021 Tenn. App. LEXIS 58 (Tenn. Ct. App. Feb. 12, 2021).

15. Termination of Parental Rights.

Evidence was sufficient to support the termination of the father's parental rights based on abandonment by wanton disregard because the record was replete with evidence of the father's recidivism, as he was arrested or incarcerated numerous times during the child's life, and he was incarcerated at the time of the hearing. In re Haskel S., — S.W.3d —, 2020 Tenn. App. LEXIS 515 (Tenn. Ct. App. Nov. 18, 2020).

Termination of the mother's parental rights for abandonment based on the failure to visit ground was proper because her two abbreviated visits, totaling around three hours and both of poor quality, constituted nothing more than token visitation during the four-month period. In re Allie-Mae K., — S.W.3d —, 2020 Tenn. App. LEXIS 529 (Tenn. Ct. App. Nov. 24, 2020).

Termination of the mother's parental rights for abandonment based on the failure to support was proper because the mother did not file an answer raising the lack of willfulness as an affirmative defense; neither the mother nor the father offered proof as to why they were unable to pay any support or why their lack of support was not willful; and the mother waived her right to assert a lack of willfulness. In re Allie-Mae K., — S.W.3d —, 2020 Tenn. App. LEXIS 529 (Tenn. Ct. App. Nov. 24, 2020).

Trial court erred by terminating the mother's parental rights based on failure to visit because her failure to bring enough books or specific books on visits was not a basis for sustaining the ground against her. The record showed that she had three appropriate visits with the children during the relevant four-month time period. In re Azariah R., — S.W.3d —, 2021 Tenn. App. LEXIS 26 (Tenn. Ct. App. Jan., 27, 2021).

Termination of a mother's parental rights was in the children's best interests because she physically abused two of the children, and she could not provide an environment free from alcohol and controlled substances. In re Kayden A., — S.W.3d —, 2021 Tenn. App. LEXIS 46 (Tenn. Ct. App. Feb. 7, 2021).

Mother's parental rights were properly terminated because the mother failed to manifest an ability to assume custody of the children, despite somewhat complying with the permanency plan prior to her incarceration, the mother failed to resolve her lack of suitable housing and did not financially support the children, she failed a drug screen and refused to comply with later testing requests, and she did not address her mental health issues and never began individual counseling. In re Kayden A., — S.W.3d —, 2021 Tenn. App. LEXIS 46 (Tenn. Ct. App. Feb. 7, 2021).

Termination of a mother's parental rights was in the child's best interests because due to

the mother's drug use and criminal behavior throughout the child's life she had very little visitation with the child, there was no bond between the mother and the child, and the child was very bonded to the foster mother, who had cared for her and had custody of her for the majority of her life. In re Hadley R., — S.W.3d —, 2021 Tenn. App. LEXIS 61 (Tenn. Ct. App. Feb. 21, 2021).

16. Determination of Abandonment.

Termination of parental rights for incarcerated parents on the ground of failure to visit was inappropriate because the Tennessee Department of Children's Services failed to properly plead the ground, and in the absence of evidence that indicated that the parents fully understood failure to visit was being tried by implied consent and because evidence relevant to the parents' failure to visit was relevant to other issues, this ground for termination was not tried by implied consent. In re Noah A., — S.W.3d —, 2020 Tenn. App. LEXIS 498 (Tenn. Ct. App. Nov. 6, 2020).

17. Wanton Disregard.

Tennessee law requires more to sustain the ground of wanton disregard than just incarceration; if a parent's actions resulting in incarceration always are sufficient to show wanton disregard, the Tennessee General Assembly would just need to say incarceration alone is a ground for termination of parental rights, but it has not done so. The court thus vacated termination based on the ground of wanton disregard. In re Trinity H., — S.W.3d —, 2020 Tenn. App. LEXIS 388 (Tenn. Ct. App. Aug. 28, 2020).

Termination of the mother's parental rights was proper because she was incarcerated from November 2018 through April 2019, which was during part of the four months preceding the filing of the petition; and she exhibited wanton disregard for the child's welfare as she admitted to drug use while pregnant with the child, and she engaged in criminal behavior while the child was in the custody of the Tennessee Department of Children's Services, resulting in the violation of her probation and hindering her ability to complete the requirements of her permanency plan. In re Kash F., — S.W.3d —, 2020 Tenn. App. LEXIS 399 (Tenn. Ct. App. Sept. 4, 2020).

Termination of the father's parental rights was proper based on abandonment by wanton disregard as he knew of the child's existence when he engaged in criminal activity; and his criminal history did not stem from one incident and showed a broader pattern of conduct that rendered him unfit or posed a risk of substantial harm to the child's welfare. In re Sylvia H., — S.W.3d —, 2021 Tenn. App. LEXIS 112 (Tenn. Ct. App. Mar. 23, 2021).

Trial court did not err by terminating the parents' rights based on abandonment by wan-

ton disregard because he was incarcerated when the petition for termination was filed and he admitted that he had been in and out of jail

since he turned 18. In re Adaleigh M., — S.W.3d —, 2021 Tenn. App. LEXIS 130 (Tenn. Ct. App. Mar. 31, 2021).

36-1-102. Part definitions. [Effective on July 1, 2022. See version Effective on June 30, 2022.]

JUDICIAL DECISIONS

1. Constitutionality of Definition.

While T.C.A. § 36-1-102(1), as amended in 2018, eliminates the willful component of the petitioning party's burden, it does not create an irrebuttable presumption that a parent's failure to support constitutes abandonment; instead, the statute leaves open an avenue by way of affirmative defense for a parent to establish that her failure to support was not willful. The statute is not obviously unconstitutional on its face. In re Arianna B., — S.W.3d —, 2020 Tenn. App. LEXIS 499 (Tenn. Ct. App. Nov. 9, 2020).

5. Abandoned Child.

7. —Incarceration.

In a termination of parental rights action, due to the mother's 80-day incarceration, T.C.A. § 36-1-102(1)(A)(i) was not a proper ground for termination of her parental rights. Instead, § 36-1-102(1)(A)(iv) contained the applicable definition of abandonment but since this was not plead the juvenile court's finding of abandonment by the mother had to be reversed. In re A.V.N., — S.W.3d —, 2020 Tenn. App. LEXIS 406 (Tenn. Ct. App. Sept. 10, 2020).

Trial court erred in terminating the father's parental rights based on abandonment because the trial court's order stated no findings with respect to abandonment during the relevant four months preceding the father's incarceration in November 2017. In re Layton W., — S.W.3d —, 2020 Tenn. App. LEXIS 445 (Tenn. Ct. App. Oct. 6, 2020).

Trial court did not err by terminating the mother's parental rights based on abandonment by an incarcerated parent because her criminal history was extensive prior to her incarceration, her substance abuse caused the initial removal of the child from her custody, when she was given the opportunity for a trial home placement she squandered that opportunity by using drugs, her positive drug test led to her probation violation and subsequent incarceration, she failed to provide adequate support or supervision for the child, and she pleaded guilty to child neglect. In re Brantley O., — S.W.3d —, 2020 Tenn. App. LEXIS 472 (Tenn. Ct. App. Oct. 22, 2020).

Termination of parental rights for incarcerated parents on the ground of abandonment by wanton disregard was appropriate because when the parents were not incarcerated the

parents tested positive for illegal substances, failed to complete the permanency plan, failed to maintain regular visitation with the child, and ceased communication with the Tennessee Department of Children's Services prior to their incarceration. As a result, the parents abandoned the child by engaging in conduct that exhibited a wanton disregard for the child's welfare. In re Noah A., — S.W.3d —, 2020 Tenn. App. LEXIS 498 (Tenn. Ct. App. Nov. 6, 2020).

Trial court erred by terminating the father's parental rights based on abandonment by an incarcerated parent because it did not set out the correct four-month period so as to put the father on notice and the Tennessee Department of Children's Services withdrew the ground at trial. In re Haskel S., — S.W.3d —, 2020 Tenn. App. LEXIS 515 (Tenn. Ct. App. Nov. 18, 2020).

Clear and convincing evidence supported the trial court's determination that the father abandoned the child because it showed that he had a long history of probation violations, criminal behavior, and substance abuse, and he did not contact DCS when he was released from prison even though he knew the child was in foster care. In re Malachi M., — S.W.3d —, 2020 Tenn. App. LEXIS 527 (Tenn. Ct. App. Nov. 20, 2020).

Termination of a father's parental rights on the ground of abandonment by exhibiting a wanton disregard for the children's welfare was appropriate because the father was incarcerated during part of the four months immediately preceding the filing of the termination action, and, given the father's long criminal history, the father's incarceration was part of a broader pattern of conduct that rendered him unfit or posed a risk of substantial harm to the welfare of the child. In re Brayden E., — S.W.3d —, 2020 Tenn. App. LEXIS 549 (Tenn. Ct. App. Dec. 4, 2020).

Mother's rights were properly terminated for abandonment by an incarcerated parent; she was incarcerated at the time of the termination petition's filing and had been incarcerated during all of the four months immediately preceding the filing, plus her repeated criminal behavior resulting in incarceration and her failure to take care of the child even when she was on parole demonstrated her wanton disregard for the child's welfare. In re Malachi M., — S.W.3d —, 2021 Tenn. App. LEXIS 121 (Tenn. Ct. App. Mar. 25, 2021).

8. —Suitable Home.

Termination of the mother's parental rights was proper on the ground of abandonment by failure to provide a suitable home; despite services, the mother was unable to keep her home clean, as there was trash everywhere, one child came down with scabies, there were truancy issues, and the home was not free from domestic violence. In re Cheyenne S., — S.W.3d —, 2020 Tenn. App. LEXIS 431 (Tenn. Ct. App. Sept. 24, 2020).

Termination of the mother's parental rights was proper based on abandonment because she failed to provide a suitable home for the child as she continued to use drugs, engage in criminal activities, and live in an unsuitable home. In re Braden K., — S.W.3d —, 2020 Tenn. App. LEXIS 437 (Tenn. Ct. App. Sept. 30, 2020).

Tennessee Department of Children's Services established the ground for termination of parental rights of abandonment by failure to provide a suitable home by clear and convincing evidence because the mother failed to follow through with the Department's recommendations, did not have a suitable home or transportation, failed to provide an accurate address for a home, and got into an abusive relationship. A year after the removal of the child from the home, the mother remained homeless and continued to have substance abuse issues. In re Meghan M.R., — S.W.3d —, 2020 Tenn. App. LEXIS 457 (Tenn. Ct. App. Oct. 16, 2020).

Termination of parental rights for abandonment by failure to provide a suitable home was appropriate because the child was removed from the parents' home as the parents and the child were living in paternal grandparents' home. The parents also did not make reasonable efforts to provide the child with a home that was free of drugs and the parents' actions following the removal demonstrated a lack of concern for the welfare of the child such that it is unlikely that the parents would have been able to provide a suitable home at an early date. In re Noah A., — S.W.3d —, 2020 Tenn. App. LEXIS 498 (Tenn. Ct. App. Nov. 6, 2020).

Termination of the mother's parental rights was proper based on abandonment by failure to provide a suitable home because she was not able to establish a home to which the children could safely return due to her lack of parenting skills and inattentiveness to the children's needs; she did not always actively participate or implement parenting skills during the visitation she was provided; she did not provide documentation concerning a mental health assessment or continued counseling; and she never progressed to the point of having unsupervised visitation with the children. In re Treymarion S., — S.W.3d —, 2020 Tenn. App. LEXIS 599 (Tenn. Ct. App. Dec. 30, 2020).

Termination ground of failure to establish a suitable home was established in this case; the child had been removed from the mother by

court order in 2018 and reasonable efforts over 20 months had been made by the department to help the mother establish a suitable home, including providing housing resources and referrals for mental health assessments, yet the mother failed to follow recommendations for mental health treatment and resided in various facilities that did not allow children. In re Dominic B., — S.W.3d —, 2021 Tenn. App. LEXIS 77 (Tenn. Ct. App. Mar. 3, 2021).

Termination ground of failure to establish a suitable home was established in this case; the child had been removed from the mother by court order in 2018 and reasonable efforts over 20 months had been made by the department to help the mother establish a suitable home, including providing housing resources and referrals for mental health assessments, yet the mother failed to follow recommendations for mental health treatment and resided in various facilities that did not allow children. In re Dominic B., — S.W.3d —, 2021 Tenn. App. LEXIS 77 (Tenn. Ct. App. Mar. 3, 2021).

Termination petition alleged only one ground for the termination of father's parental rights, abandonment by failure to financially support the child; based on the relevance of the findings to the best interest analysis and the trial court's reliance on the petition, the court disagreed that the trial court terminated the father's parental rights based on the ground of abandonment by failure to provide a suitable home. In re Leilyn S., — S.W.3d —, 2021 Tenn. App. LEXIS 100 (Tenn. Ct. App. Mar. 16, 2021).

Trial court did not err by terminating the parents' rights based on abandonment by failure to establish a suitable home because the evidence showed that the father was incarcerated at the time of trial and the mother testified that she was staying with a friend in a camper but she did not know who owned it. In re Adaleigh M., — S.W.3d —, 2021 Tenn. App. LEXIS 130 (Tenn. Ct. App. Mar. 31, 2021).

9. —Support of Child.

Mother and stepfather failed to prove by clear and convincing evidence that the father willfully failed to pay support because they presented no wage statements or other evidence of the father's employment during the relevant four-month period, emails suggested that he was in treatment for alcohol addiction for part of that time, and the father's lack of employment and income was supported by his bank and credit union records. In re Mattie L., — S.W.3d —, 2020 Tenn. LEXIS 599 (Tenn. Feb. 8, 2021).

Evidence was less than clear that the father abandoned his child by the willful failure to pay support; the father testified credibly that he sent checks every month for the child to his attorney, which was reasonable as a restraining order instructed the father to refrain from all contact with the mother, and the father, a

convicted felon on supervised release, wanted to avoid any possibility of violating the order, plus the father's attorney acknowledged that it was error on his part in not forwarding the money. *In re Austin J.*, — S.W.3d —, 2020 Tenn. App. LEXIS 107 (Tenn. Ct. App. Mar. 13, 2020).

Termination of the mother's parental rights was proper based on abandonment for willful failure to visit and to support because, although the father had relocated to Tennessee and lived with his parents, the mother knew his email address and his parent's physical address; and, when the mother had disposable income, and had the ability to pay support, she chose not to. *In re Aiden M.*, — S.W.3d —, 2020 Tenn. App. LEXIS 361 (Tenn. Ct. App. Aug. 11, 2020).

Termination of the mother's parental rights was proper based on abandonment because the mother did not provide support for the child from December 11, 2018 to April 10, 2019; she received the initial custody order that stated she had a duty to provide support for the child; she was reminded of that duty when she would attend court proceedings before the juvenile court or meetings with the family service worker; each permanency plan stated she was responsible for paying child support; and the mother provided no justifiable excuse for failing to provide support. *In re Braden K.*, — S.W.3d —, 2020 Tenn. App. LEXIS 437 (Tenn. Ct. App. Sept. 30, 2020).

Burden was on the mother to prove her failure to support was not willful, which she failed to do; in the interim between the child entering petitioner's custody to petitioner being designated the new payee on the child's social security benefits, the mother never passed any of the benefits to petitioner for the child's benefit, plus a photograph of a belt and gifts that never were delivered was not child support. The ground of failure to support was proven by clear evidence, supporting termination of the mother's rights. *In re Arianna B.*, — S.W.3d —, 2020 Tenn. App. LEXIS 499 (Tenn. Ct. App. Nov. 9, 2020).

Trial court correctly found that the father abandoned the child by failing to provide support because the father knew he had an obligation to support the child, was able to work pre-incarceration, and knew how to contact the foster parents but provided the child with no more than token support during the relevant four-month period; given the father's testimony of his ability to work in multiple capacities, there was no justification for his failure to support the child financially. *In re Brooklyn R.*, — S.W.3d —, 2020 Tenn. App. LEXIS 506 (Tenn. Ct. App. Nov. 13, 2020).

Termination ground of abandonment by failure to support was proven against the father by clear and convincing evidence; in view of his \$90 per month cigarette budget, his failure to pay \$50 per month in child support was baffling, plus he testified that he was able to work

and earn a living, such that his deficient support payments constituted only token support for the child. *In re Ryan J. H.*, — S.W.3d —, 2020 Tenn. App. LEXIS 582 (Tenn. Ct. App. Dec. 22, 2020).

Father's failure to support the child was willful, and therefore the trial court properly found that the mother and stepfather met their burden of proving abandonment by failure to support, because by his own testimony the father's attempts to support the child were token at best and it would be incorrect to say that the mother thwarted the father's attempts at support because these attempts were sporadic and the funds offered were insignificant and made only when the father felt compelled. *In re Ella H.*, — S.W.3d —, 2021 Tenn. App. LEXIS 12 (Tenn. Ct. App. Jan. 13, 2021).

Trial court properly found that the mother abandoned the child because she did not show any proof of her compliance with her alcohol and drug treatment, she admitted using methamphetamine for six months, and she was able to work, but she paid no child support nor did she provide any necessary items for the child. *In re Hadley R.*, — S.W.3d —, 2021 Tenn. App. LEXIS 61 (Tenn. Ct. App. Feb. 21, 2021).

Termination of a mother's parental rights to the mother's child on the grounds of abandonment by failure to support because there was sufficient evidence to support the trial court's findings that the mother abandoned the child by failing to provide support to the child during the relevant four-month period. Furthermore, the mother failed to meet the mother's burden to show that the mother's failure to do so was not willful. *In re Lucas S.*, — S.W.3d —, 2021 Tenn. App. LEXIS 67 (Tenn. Ct. App. Feb. 26, 2021).

Trial court did not err in terminating the father's parental rights for abandonment by failure to financially support the child; trial court correctly determined that T.C.A. § 36-1-102(1)(A)(iv) applied, aggregated the father's non-incarceration time prior to the filing of the petition, and found that he had not paid any child support in the 127 days that he had been out of jail prior to the petition's filing. *In re Leilynn S.*, — S.W.3d —, 2021 Tenn. App. LEXIS 100 (Tenn. Ct. App. Mar. 16, 2021).

Parental termination ground of abandonment by failure to support was proven as the mother willfully failed to support the children; she was aware of her duty to support her children and had the ability to pay some support, but chose to prioritize other expenditures. *In re Hayden F.*, — S.W.3d —, 2021 Tenn. App. LEXIS 119 (Tenn. Ct. App. Mar. 24, 2021).

10. —Failure to visit.

Mother and stepfather failed to prove by clear and convincing evidence that the father willfully failed to visit because his lack of visitation from during the relevant four-month

period resulted from coercion, the mother's refusal to allow visitation unless the father paid support. In *re* Mattie L., — S.W.3d —, 2020 Tenn. LEXIS 599 (Tenn. Feb. 8, 2021).

Tennessee Department of Children's Services established the ground for termination of parental rights of abandonment by failure to visit by clear and convincing evidence because the mother, who was not in jail or incapacitated in any way, did not visit the child during the four months prior to the filing of the petition for termination of parental rights. Furthermore, the mother did not meet the mother's burden to prove at trial that the mother's failure to visit the child was not willful. In *re* Meghan M.R., — S.W.3d —, 2020 Tenn. App. LEXIS 457 (Tenn. Ct. App. Oct. 16, 2020).

Trial court did not err in terminating the mother's parental rights to the child based on her failure to visit the child during the determinative period because the mother did not establish lack of willfulness of an affirmative defense, as the father's demands that she provide documentation of a clean drug screen and some type of mental health assessment prior to resumption of supervised visitation were aligned with the requirements in the juvenile court's order and the record revealed no indication that the father ever prevented the mother from providing the juvenile court or him with documentation of compliance with the order. In *re* Jude M., — S.W.3d —, 2020 Tenn. App. LEXIS 469 (Tenn. Ct. App. Oct. 22, 2020).

Trial court's finding of abandonment by failure to visit was proven by clear and convincing evidence because a father engaged in no more than token visitation with the child; the father visited the child at most three times during the relevant four-month period, he had no justifiable excuse for his failure to visit the child less than a handful of times, and there was no proof as to why he failed to visit more often. In *re* Brooklyn R., — S.W.3d —, 2020 Tenn. App. LEXIS 506 (Tenn. Ct. App. Nov. 13, 2020).

Termination of a father's parental rights on the ground of abandonment for failure to visit was appropriate because the father did not attempt to contact the children and disappeared for months at a time. Furthermore, the father did not challenge no-contact order based on the father's continued noncompliance with the permanency plan until when the father filed a motion for visitation, and the father's frequent incarcerations did not prevent the father from contacting the children. In *re* Brayden E., — S.W.3d —, 2020 Tenn. App. LEXIS 549 (Tenn. Ct. App. Dec. 4, 2020).

Father's failure to visit the child was willful, and therefore the trial court properly found that the mother and stepfather met their burden of proving abandonment by failure to visit, because the record showed he never made a genuine effort to visit the child. The father would not commit to the mother's reasonable

request of establishing a consistent visitation schedule and there was no explanation as to why he failed to pursue visitation despite ample opportunity to do so. In *re* Ella H., — S.W.3d —, 2021 Tenn. App. LEXIS 12 (Tenn. Ct. App. Jan. 13, 2021).

Trial court erred in finding that the mother abandoned the child by failure to visit; although she only visited for a total of five hours, it was not token, as one of her visits was unexpectedly cut short by the father, and the mother's two other attempts to visit were declined by the father. Furthermore, there was communication between the mother and the child, including five set of texts instigated by the mother and three sets instigated by either the child or the father and stepmother. In *re* Brianna B., — S.W.3d —, 2021 Tenn. App. LEXIS 31 (Tenn. Ct. App. Feb. 2, 2021).

Termination of a mother's parental rights to the mother's child on the grounds of abandonment by failure to visit was appropriate because there was sufficient evidence to support the trial court's findings that the mother abandoned the child by failing to visit the child during the relevant four-month period. Furthermore, the mother failed to meet the mother's burden to show that the mother's failure to do so was not willful. In *re* Lucas S., — S.W.3d —, 2021 Tenn. App. LEXIS 67 (Tenn. Ct. App. Feb. 26, 2021).

Mother established by a preponderance of the evidence that her failure to visit was not willful and thus the court reversed the finding that the parental termination ground of abandonment by willful failure to visit was proven; although the mother could have made a greater effort, the evidence supported a finding that the father significantly interfered, as he hid his new address from her, refused to communicate with her unless the conversation was refereed, and rebuffed some of her attempts at visitation. In *re* Hayden F., — S.W.3d —, 2021 Tenn. App. LEXIS 119 (Tenn. Ct. App. Mar. 24, 2021).

12. Legal Parent.

Aunt and uncle were not the child's guardians within the meaning of the adoption statute and thus they were not necessary parties to the adoption proceeding, which was not void; aunt and uncle were never appointed or defined by law as the child's guardian or conservator, given that the juvenile court's order only awarded them visitation with the child, while the grandparents were awarded temporary legal custody. In *re* M.L.S., — S.W.3d —, 2020 Tenn. App. LEXIS 458 (Tenn. Ct. App. Oct. 16, 2020).

Legal parent who signed a voluntary acknowledgment of paternity (VAP) was properly ordered to pay child support, although the legal parent was not the biological father of the child, because the legal parent failed to prove the existence of a material mistake of fact that

would have warranted rescission of the VAP and ordering the legal parent to pay child support was consistent with public policy. *State ex rel. Kimberly C. v. Gordon S.*, — S.W.3d —, 2020 Tenn. App. LEXIS 541 (Tenn. Ct. App. Nov. 30, 2020).

13. Putative Father.

Father was the putative, rather than the legal, father of the child because the DNA test results do not appear in the record, nor is there an order regarding parentage or a voluntary acknowledgment of paternity. *In re Tiffany B.*, — S.W.3d —, 2021 Tenn. App. LEXIS 58 (Tenn. Ct. App. Feb. 12, 2021).

15. Termination of Parental Rights.

Evidence was sufficient to support the termination of the father's parental rights based on abandonment by wanton disregard because the record was replete with evidence of the father's recidivism, as he was arrested or incarcerated numerous times during the child's life, and he was incarcerated at the time of the hearing. *In re Haskel S.*, — S.W.3d —, 2020 Tenn. App. LEXIS 515 (Tenn. Ct. App. Nov. 18, 2020).

Termination of the mother's parental rights for abandonment based on the failure to visit ground was proper because her two abbreviated visits, totaling around three hours and both of poor quality, constituted nothing more than token visitation during the four-month period. *In re Allie-Mae K.*, — S.W.3d —, 2020 Tenn. App. LEXIS 529 (Tenn. Ct. App. Nov. 24, 2020).

Termination of the mother's parental rights for abandonment based on the failure to support was proper because the mother did not file an answer raising the lack of willfulness as an affirmative defense; neither the mother nor the father offered proof as to why they were unable to pay any support or why their lack of support was not willful; and the mother waived her right to assert a lack of willfulness. *In re Allie-Mae K.*, — S.W.3d —, 2020 Tenn. App. LEXIS 529 (Tenn. Ct. App. Nov. 24, 2020).

Trial court erred by terminating the mother's parental rights based on failure to visit because her failure to bring enough books or specific books on visits was not a basis for sustaining the ground against her. The record showed that she had three appropriate visits with the children during the relevant four-month time period. *In re Azariah R.*, — S.W.3d —, 2021 Tenn. App. LEXIS 26 (Tenn. Ct. App. Jan., 27, 2021).

Termination of a mother's parental rights was in the children's best interests because she physically abused two of the children, and she could not provide an environment free from alcohol and controlled substances. *In re Kayden A.*, — S.W.3d —, 2021 Tenn. App. LEXIS 46 (Tenn. Ct. App. Feb. 7, 2021).

Mother's parental rights were properly terminated because the mother failed to manifest

an ability to assume custody of the children, despite somewhat complying with the permanency plan prior to her incarceration, the mother failed to resolve her lack of suitable housing and did not financially support the children, she failed a drug screen and refused to comply with later testing requests, and she did not address her mental health issues and never began individual counseling. *In re Kayden A.*, — S.W.3d —, 2021 Tenn. App. LEXIS 46 (Tenn. Ct. App. Feb. 7, 2021).

Termination of a mother's parental rights was in the child's best interests because due to the mother's drug use and criminal behavior throughout the child's life she had very little visitation with the child, there was no bond between the mother and the child, and the child was very bonded to the foster mother, who had cared for her and had custody of her for the majority of her life. *In re Hadley R.*, — S.W.3d —, 2021 Tenn. App. LEXIS 61 (Tenn. Ct. App. Feb. 21, 2021).

16. Determination of Abandonment.

Termination of parental rights for incarcerated parents on the ground of failure to visit was inappropriate because the Tennessee Department of Children's Services failed to properly plead the ground, and in the absence of evidence that indicated that the parents fully understood failure to visit was being tried by implied consent and because evidence relevant to the parents' failure to visit was relevant to other issues, this ground for termination was not tried by implied consent. *In re Noah A.*, — S.W.3d —, 2020 Tenn. App. LEXIS 498 (Tenn. Ct. App. Nov. 6, 2020).

17. Wanton Disregard.

Tennessee law requires more to sustain the ground of wanton disregard than just incarceration; if a parent's actions resulting in incarceration always are sufficient to show wanton disregard, the Tennessee General Assembly would just need to say incarceration alone is a ground for termination of parental rights, but it has not done so. The court thus vacated termination based on the ground of wanton disregard. *In re Trinity H.*, — S.W.3d —, 2020 Tenn. App. LEXIS 388 (Tenn. Ct. App. Aug. 28, 2020).

Termination of the mother's parental rights was proper because she was incarcerated from November 2018 through April 2019, which was during part of the four months preceding the filing of the petition; and she exhibited wanton disregard for the child's welfare as she admitted to drug use while pregnant with the child, and she engaged in criminal behavior while the child was in the custody of the Tennessee Department of Children's Services, resulting in the violation of her probation and hindering her ability to complete the requirements of her permanency plan. *In re Kash F.*, — S.W.3d —,

2020 Tenn. App. LEXIS 399 (Tenn. Ct. App. Sept. 4, 2020).

Termination of the father's parental rights was proper based on abandonment by wanton disregard as he knew of the child's existence when he engaged in criminal activity; and his criminal history did not stem from one incident and showed a broader pattern of conduct that rendered him unfit or posed a risk of substantial harm to the child's welfare. In re Sylvia H.,

— S.W.3d —, 2021 Tenn. App. LEXIS 112 (Tenn. Ct. App. Mar. 23, 2021).

Trial court did not err by terminating the parents' rights based on abandonment by wanton disregard because he was incarcerated when the petition for termination was filed and he admitted that he had been in and out of jail since he turned 18. In re Adaleigh M., — S.W.3d —, 2021 Tenn. App. LEXIS 130 (Tenn. Ct. App. Mar. 31, 2021).

36-1-106. Readoption.

NOTES TO DECISIONS

3. Best Interests Analysis.

Trial court's order did not reflect that the trial court considered the appropriate best interests factors for termination of parental rights set forth in the termination of parental rights statute as the trial court considered the best interest factors in the child custody statute, which addressed factors that a trial court

had to consider in a suit for annulment, divorce, or separate maintenance; thus, the trial court's conclusions as to the child's best interests did not satisfy the analysis mandated by statute. In re Layton W., — S.W.3d —, 2020 Tenn. App. LEXIS 445 (Tenn. Ct. App. Oct. 6, 2020).

36-1-111. Presurrender request for home study or preliminary home study — Surrender of child — Consent for adoption by parent — Effect of Surrender — Form of surrender — Waiver of interest — Interpreter for non-English speaking parents. [Effective until June 30, 2022. See version Effective on July 1, 2022.]

NOTES TO DECISIONS

4. Appeal of Custody Petition Rendered Moot.

Because the grandson's parents surrendered their parental rights as to him and the juvenile court awarded custody to the Tennessee Department of Children's Services, the juvenile

court's order adjudicating the grandmother's petition for custody was displaced as to the grandson, and therefore the grandmother's appeal was moot. In re Brilee E., — S.W.3d —, 2021 Tenn. App. LEXIS 163 (Tenn. Ct. App. Apr. 20, 2021).

36-1-111. Presurrender request for home study or preliminary home study — Surrender of child — Consent for adoption by parent — Effect of Surrender — Form of surrender — Waiver of interest — Interpreter for non-English speaking parents. [Effective on July 1, 2022. See version Effective until June 30, 2022.]

NOTES TO DECISIONS

4. Appeal of Custody Petition Rendered Moot.

Because the grandson's parents surrendered their parental rights as to him and the juvenile court awarded custody to the Tennessee Department of Children's Services, the juvenile

court's order adjudicating the grandmother's petition for custody was displaced as to the grandson, and therefore the grandmother's appeal was moot. In re Brilee E., — S.W.3d —, 2021 Tenn. App. LEXIS 163 (Tenn. Ct. App. Apr. 20, 2021).

36-1-113. Termination of parental or guardianship rights.**NOTES TO DECISIONS****ANALYSIS**

7. Procedural Matters.
11. Findings of Fact.
15. Persistent Conditions.
16. Abandonment.
17. Substantial Noncompliance.
18. Incarcerated Parent.
19. Parent's Mental Condition.
20. Child Support.
21. Child Abuse.
22. Failure to Manifest an Ability and Willingness to Assume Custody or Financial Responsibility.
23. Best Interests of Children.
24. Permanency Plans.
26. Appellate Review.
28. Termination Improper.
33. Evidence Sufficient.

7. Procedural Matters.

Termination of parental rights for incarcerated parents on the ground of failure to visit was inappropriate because the Tennessee Department of Children's Services failed to properly plead the ground, and in the absence of evidence that indicated that the parents fully understood failure to visit was being tried by implied consent and because evidence relevant to the parents' failure to visit was relevant to other issues, this ground for termination was not tried by implied consent. In re Noah A., — S.W.3d —, 2020 Tenn. App. LEXIS 498 (Tenn. Ct. App. Nov. 6, 2020).

Because the grandson's parents surrendered their parental rights as to him and the juvenile court awarded custody to the Tennessee Department of Children's Services, the juvenile court's order adjudicating the grandmother's petition for custody was displaced as to the grandson, and therefore the grandmother's appeal was moot. In re Brilee E., — S.W.3d —, 2021 Tenn. App. LEXIS 163 (Tenn. Ct. App. Apr. 20, 2021).

11. Findings of Fact.

Vacating of order terminating a father's parental rights and remanding of the case for further proceedings was appropriate because the appellate court found that it was unable to review the trial court's decision as there were significant deficiencies in the trial court's order in that the order lacked necessary findings of fact and conclusions of law. The trial court failed to fully analyze one of the grounds for termination upon which it based its ruling and failed to address all of the relevant factors regarding the best interest analysis. In re Au-

turn D., — S.W.3d —, 2020 Tenn. App. LEXIS 487 (Tenn. Ct. App. Oct. 28, 2020).

Because a trial court failed to make sufficient findings of fact relevant to the statutory grounds of abandonment by failure to visit a child and failure to provide financial support for the child and the statement of the evidence approved by the court was insufficient for the appellate court to review the termination of parental rights on appeal, the court's judgment was vacated and the case was remanded for the court to make sufficient findings of fact and conclusions of law. In re Maddox F., — S.W.3d —, 2020 Tenn. App. LEXIS 594 (Tenn. Ct. App. Dec. 23, 2020).

15. Persistent Conditions.

Conditions remained present that would likely cause the child to be subjected to further neglect and these conditions were likely to remain for the near future, making termination for persistence of conditions proper; whether the mother would be offered support from a rescue mission and whether she would be able to care for her son were precariously balanced on a slew of contingencies, plus she would need to maintain her sobriety. In re Raylan W., — S.W.3d —, 2020 Tenn. App. LEXIS 375 (Tenn. Ct. App. Aug. 20, 2020).

Clear and convincing evidence supported the trial court's termination of the mother's parental rights based on persistence of conditions because the record showed that the mother was not equipped to deal with the child's health needs, as she had difficulty understanding those needs and taking directions from medical professionals. The mother was unable to answer basic questions about the child's medical needs and history. In re Katrina S., — S.W.3d —, 2020 Tenn. App. LEXIS 398 (Tenn. Ct. App. Sept. 3, 2020).

Termination based on persistent of conditions was proper because there was insufficient evidence to conclude that the parents conditions would be remedied at an early date, as the mother continued to use drugs and saw no issue with sharing an apartment with other drug users, the mother had a pending DUI charge and \$3,500 of unpaid fees on her driver's license, and the parents' difficulties in maintaining employment were caused in large part by their drug and criminal issues. In re A.V.N., — S.W.3d —, 2020 Tenn. App. LEXIS 406 (Tenn. Ct. App. Sept. 10, 2020).

Termination of the mother's rights was proper under the persistence of conditions ground; at the time of trial, the children had been removed from the mother's custody for more than six months and the conditions pre-

venting the children's safe return remained, as the mother's house was still very dirty, there was a lack of food, and the pest issue continued. In re Cheyenne S., — S.W.3d —, 2020 Tenn. App. LEXIS 431 (Tenn. Ct. App. Sept. 24, 2020).

Termination of the mother's parental rights was proper based on the persistence of conditions that led to the child's removal because the child was removed due to the mother's drug use, alcohol abuse, and environmental neglect; she continued to consume illegal drugs and drink alcohol and engage in criminal activity; her current home had several attributes that would likely lead to environmental neglect of a child; and a continuation of a parent-child relationship between the mother and the child would greatly diminish his chances of integrating into a safe and stable home. In re Braden K., — S.W.3d —, 2020 Tenn. App. LEXIS 437 (Tenn. Ct. App. Sept. 30, 2020).

Tennessee Department of Children's Services established by clear and convincing evidence grounds for termination of parental rights because the record did not indicate that the mother has remedied the conditions that caused the mother's child to be removed from the mother's custody or that the mother was likely to remedy the conditions anytime soon. Continuing the mother/child relationship would have greatly diminished the child's opportunity to be integrated into the safe, stable, and permanent home the foster mother was offering to provide. In re Meghan M.R., — S.W.3d —, 2020 Tenn. App. LEXIS 457 (Tenn. Ct. App. Oct. 16, 2020).

Trial court did erred in terminating the mother's parental rights to the child based on persistence of conditions leading to the child's removal because the father and stepmother failed to demonstrate the threshold requirement of a petition having been filed in the juvenile court that alleged the child to be a dependent and neglected child, as they failed to provide the court or the trial court with the father's juvenile court petition and whether he alleged that the child was a dependent and neglected child in his juvenile court petition was not discernible from the juvenile court's orders. In re Jude M., — S.W.3d —, 2020 Tenn. App. LEXIS 469 (Tenn. Ct. App. Oct. 22, 2020).

Termination based on persistence of conditions was supported by findings that the parents had not completed the required tasks on the permanency plan to make it safe for the children to return home and refused to accept responsibility or acknowledge the child abuse. In re Brian W., — S.W.3d —, 2020 Tenn. App. LEXIS 479 (Tenn. Ct. App. Oct. 30, 2020).

Conditions that led to removal still persisted and prevented the safe return of the children to the care of the parent. The mother was still battling her addiction and mental health issues, and there was little likelihood that those conditions would be remedied soon. In re Ed-

ward R., — S.W.3d —, 2020 Tenn. App. LEXIS 496 (Tenn. Ct. App. Nov. 6, 2020).

Termination of parental rights on the basis of persistence of conditions was appropriate because the child was removed from the parents' custody, the trial court adjudicated the child as dependent and neglected, and the parents' substance abuse and inability to provide a suitable home that led to the child's removal persisted as the parents tested positive for unprescribed substances and still had not provided a suitable home for the child so that the child could not safely be returned to the parents' custody in the near future. In re Noah A., — S.W.3d —, 2020 Tenn. App. LEXIS 498 (Tenn. Ct. App. Nov. 6, 2020).

Evidence was sufficient to support the termination of the father's parental rights based on substantial non-compliance with the permanency plan because the caseworker testified that the father's drug and alcohol abuse and the incarcerations stemming from his behaviors while under the influence had been the primary concerns, the caseworker testified that he refused to go to treatment but instead continued to engage in behaviors that resulted in more criminal charges and incarcerations. The father's pattern of incarceration resulted in his inability to provide suitable housing for the child and his inability to visit the child so as to develop any parental bond. In re Haskel S., — S.W.3d —, 2020 Tenn. App. LEXIS 515 (Tenn. Ct. App. Nov. 18, 2020).

Termination of the mother's parental rights on the ground of persistent conditions was reversed as the appellate court was unable to determine, by clear and convincing evidence, whether the children were removed from her home or custody by a court order entered at any stage of proceedings in which a petition had been filed in the juvenile court alleging that a child was a dependent and neglected child. In re Allie-Mae K., — S.W.3d —, 2020 Tenn. App. LEXIS 529 (Tenn. Ct. App. Nov. 24, 2020).

Termination of parental rights based on persistence of conditions was supported by evidence that the child had been removed from the parents' custody for more than six months and that the conditions underlying the child's removal, primarily drug exposure and a transient, unstable living situation, has not been remedied. In re Collwynn J., — S.W.3d —, 2020 Tenn. App. LEXIS 562 (Tenn. Ct. App. Dec. 11, 2020).

Evidence supported the persistence conditions finding where the mother's housing remained unstable, she had a dangerous pattern of engaging in romantic relationships with men she barely knew and relying on them for support, and she was unable to provide a clean home or budget her money. In re Amber R., — S.W.3d —, 2020 Tenn. App. LEXIS 597 (Tenn. Ct. App. Dec. 29, 2020).

Termination of the mother's parental rights was proper based on the persistence of the conditions leading to removal of the children because, although the mother was provided services by the Department of Children's Services (DCS) for almost three years by the time of trial, she had still failed to establish a suitable home or exhibit appropriate parenting skills during supervised visitation; based on the length of time that the children had been in DCS custody, there was little likelihood that the conditions would be remedied at an early date so that the children could be safely returned to the mother; and the continuation of the parent-child relationship would inhibit the children's ability to integrate into a stable home. *In re Treymarion S.*, — S.W.3d —, 2020 Tenn. App. LEXIS 599 (Tenn. Ct. App. Dec. 30, 2020).

Termination of the mother's parental rights based a failure to remedy persistent conditions where the conditions that cause the children's removal, including the mother drug use and its impact on her ability to parent, persisted and there was little likelihood that they would change any time soon. *In re Katelynn S.*, — S.W.3d —, 2021 Tenn. App. LEXIS 5 (Tenn. Ct. App. Jan. 8, 2021).

Trial court's termination of a mother's parental rights based upon persistence of conditions was inappropriate because the mother's incarceration, standing alone, did not amount to a persistent condition preventing the children's return to the mother's custody. Furthermore, there was no proof of the mother's continued neglect after the children's removal into the custody of the Tennessee Department of Children's Services as the mother was incarcerated before that event occurred. *In re Scarlet W.*, — S.W.3d —, 2021 Tenn. App. LEXIS 16 (Tenn. Ct. App. Jan. 15, 2021).

Mother's parental rights were properly terminated because the mother failed to manifest an ability to assume custody of the children, despite somewhat complying with the permanency plan prior to her incarceration, the mother failed to resolve her lack of suitable housing and did not financially support the children, she failed a drug screen and refused to comply with later testing requests, and she did not address her mental health issues and never began individual counseling. *In re Kayden A.*, — S.W.3d —, 2021 Tenn. App. LEXIS 46 (Tenn. Ct. App. Feb. 7, 2021).

Trial court erred by terminating the father's parental rights based on persistence of conditions because the record did not indicate that the child was ever removed from the father's custody based on a judicial finding of dependency, neglect, or abuse as to the father. *In re Tiffany B.*, — S.W.3d —, 2021 Tenn. App. LEXIS 58 (Tenn. Ct. App. Feb. 12, 2021).

Because a child's father and stepmother did not plead the ground of persistence of condi-

tions that led to the child's removal and because the threshold requirements for that ground were not met, in that the child was not removed from the mother's home as the child had lived with the father following the parents' divorce, the termination of the mother's parental rights on the ground of persistence of conditions was inappropriate. *In re Lucas S.*, — S.W.3d —, 2021 Tenn. App. LEXIS 67 (Tenn. Ct. App. Feb. 26, 2021).

Persistence of conditions ground for termination was vacated as the trial court did not make findings regarding each of the applicable elements. *In re Dominic B.*, — S.W.3d —, 2021 Tenn. App. LEXIS 77 (Tenn. Ct. App. Mar. 3, 2021).

Mother's rights were properly terminated based on persistence of conditions where during the nearly two years between the children's removal for dependency and neglect, she did virtually nothing to address the reasons for the removal, i.e., lack of housing, substance abuse problems, and mental health issues. *In re River L.*, — S.W.3d —, 2021 Tenn. App. LEXIS 83 (Tenn. Ct. App. Mar. 6, 2021).

Parental termination ground of persistence of conditions was proven as conditions preventing the children's safe return to the mother remained; in four years, she made less than a determined effort to improve the conditions that led to the children's removal, she did not support the children, and she did not seek undergo drug assessment and treatment. *In re Hayden F.*, — S.W.3d —, 2021 Tenn. App. LEXIS 119 (Tenn. Ct. App. Mar. 24, 2021).

16. Abandonment.

Mother and stepfather failed to prove by clear and convincing evidence that the father willfully failed to visit because his lack of visitation from during the relevant four-month period resulted from coercion, the mother's refusal to allow visitation unless the father paid support. *In re Mattie L.*, — S.W.3d —, 2020 Tenn. App. LEXIS 599 (Tenn. App. Feb. 8, 2021).

Evidence was less than clear that the father abandoned his child by the willful failure to pay support; the father testified credibly that he sent checks every month for the child to his attorney, which was reasonable as a restraining order instructed the father to refrain from all contact with the mother, and the father, a convicted felon on supervised release, wanted to avoid any possibility of violating the order, plus the father's attorney acknowledged that it was error on his part in not forwarding the money. *In re Austin J.*, — S.W.3d —, 2020 Tenn. App. LEXIS 107 (Tenn. Ct. App. Mar. 13, 2020).

Termination of the mother's parental rights was proper based on abandonment for willful failure to visit and to support because, although the father had relocated to Tennessee and lived with his parents, the mother knew his email address and his parent's physical address; and,

when the mother had disposable income, and had the ability to pay support, she chose not to. In *re Aiden M.*, — S.W.3d —, 2020 Tenn. App. LEXIS 361 (Tenn. Ct. App. Aug. 11, 2020).

Tennessee law requires more to sustain the ground of wanton disregard than just incarceration; if a parent's actions resulting in incarceration always are sufficient to show wanton disregard, the Tennessee General Assembly would just need to say incarceration alone is a ground for termination of parental rights, but it has not done so. The court thus vacated termination based on the ground of wanton disregard. In *re Trinity H.*, — S.W.3d —, 2020 Tenn. App. LEXIS 388 (Tenn. Ct. App. Aug. 28, 2020).

Termination of the mother's parental rights was proper on the ground of abandonment by failure to provide a suitable home; despite services, the mother was unable to keep her home clean, as there was trash everywhere, one child came down with scabies, there were truancy issues, and the home was not free from domestic violence. In *re Cheyenne S.*, — S.W.3d —, 2020 Tenn. App. LEXIS 431 (Tenn. Ct. App. Sept. 24, 2020).

Termination of the mother's parental rights was proper based on abandonment because she failed to provide a suitable home for the child as she continued to use drugs, engage in criminal activities, and live in an unsuitable home. In *re Braden K.*, — S.W.3d —, 2020 Tenn. App. LEXIS 437 (Tenn. Ct. App. Sept. 30, 2020).

Petitioners, aunt and uncle, failed to prove by clear and convincing evidence a right to relief on the ground of abandonment by failure to visit against the mother where, during the relevant four-month time period, the mother had visited with the child as much as eight to ten times. In *re Rosylyn W.*, — S.W.3d —, 2020 Tenn. App. LEXIS 453 (Tenn. Ct. App. Oct. 13, 2020).

Evidence presented at the conclusion of petitioners' proof was not sufficient for the father to meet his burden of proving by a preponderance of the evidence that his failure to visit was not willful because the father failed to return to Tennessee to visit the child after moving to Georgia. In *re Rosylyn W.*, — S.W.3d —, 2020 Tenn. App. LEXIS 453 (Tenn. Ct. App. Oct. 13, 2020).

Tennessee Department of Children's Services established the ground for termination of parental rights of abandonment by failure to visit by clear and convincing evidence because the mother, who was not in jail or incapacitated in any way, did not visit the child during the four months prior to the filing of the petition for termination of parental rights. Furthermore, the mother did not meet the mother's burden to prove at trial that the mother's failure to visit the child was not willful. In *re Meghan M.R.*, — S.W.3d —, 2020 Tenn. App. LEXIS 457 (Tenn. Ct. App. Oct. 16, 2020).

Tennessee Department of Children's Services established the ground for termination of parental rights of abandonment by failure to provide a suitable home by clear and convincing evidence because the mother failed to follow through with the Department's recommendations, did not have a suitable home or transportation, failed to provide an accurate address for a home, and got into an abusive relationship. A year after the removal of the child from the home, the mother remained homeless and continued to have substance abuse issues. In *re Meghan M.R.*, — S.W.3d —, 2020 Tenn. App. LEXIS 457 (Tenn. Ct. App. Oct. 16, 2020).

Trial court did not err in terminating the mother's parental rights to the child based on her failure to visit the child during the determinative period because the mother did not establish lack of willfulness of an affirmative defense, as the father's demands that she provide documentation of a clean drug screen and some type of mental health assessment prior to resumption of supervised visitation were aligned with the requirements in the juvenile court's order and the record revealed no indication that the father ever prevented the mother from providing the juvenile court or him with documentation of compliance with the order. In *re Jude M.*, — S.W.3d —, 2020 Tenn. App. LEXIS 469 (Tenn. Ct. App. Oct. 22, 2020).

Trial court did not err by terminating the mother's parental rights based on abandonment by an incarcerated parent because her criminal history was extensive prior to her incarceration, her substance abuse caused the initial removal of the child from her custody, when she was given the opportunity for a trial home placement she squandered that opportunity by using drugs, her positive drug test led to her probation violation and subsequent incarceration, she failed to provide adequate support or supervision for the child, and she pleaded guilty to child neglect. In *re Brantley O.*, — S.W.3d —, 2020 Tenn. App. LEXIS 472 (Tenn. Ct. App. Oct. 22, 2020).

Termination of parental rights on the ground of abandonment by failure to provide a suitable home was supported by evidence that the mother and father testified they had been living in a motel but the case worker was never able to reach them there to confirm they lived at that location and, for almost two years following the children's removal, the parents failed to participate in any counseling or assessment requirements in the permanency plan. In *re Brian W.*, — S.W.3d —, 2020 Tenn. App. LEXIS 479 (Tenn. Ct. App. Oct. 30, 2020).

Juvenile court properly terminated the mother's and the father's parental rights on the ground of abandonment by failure to visit because the parents attended an initial visit, although the father was escorted out due to threatening remarks he made to a child protective services worker when the children were

removed from the parents' custody, but neither parent attended any other scheduled visits. In re Brian W., — S.W.3d —, 2020 Tenn. App. LEXIS 479 (Tenn. Ct. App. Oct. 30, 2020).

Termination of the mother's parental rights based on abandonment for failure to support the child was supported by evidence that the only contributions toward support the mother made were birthday gifts despite annual gross earnings of \$25,000, and that such a failure was willful, as the mother was aware of her duty to support the child and had sufficient means. In re Rommie H., — S.W.3d —, 2020 Tenn. App. LEXIS 480 (Tenn. Ct. App. Oct. 30, 2020).

Termination of the mother's parental rights based on abandonment for failure to visit was supported by evidence that the mother only visited the child three times in the relevant period and that such visits were merely token. In re Rommie H., — S.W.3d —, 2020 Tenn. App. LEXIS 480 (Tenn. Ct. App. Oct. 30, 2020).

Tennessee Department of Children's Services failed to make reasonable efforts to assist a mother in establishing a suitable home where it made no effort to assist her with housing, offered transportation assistance for only one appointment, gave her a binder containing some job listings, but no real assistance in complying with recommendations from the mental health, alcohol, and drug assessments she had obtained on her own. In re Edward R., — S.W.3d —, 2020 Tenn. App. LEXIS 496 (Tenn. Ct. App. Nov. 6, 2020).

Termination of parental rights for abandonment by failure to provide a suitable home was appropriate because the child was removed from the parents' home as the parents and the child were living in paternal grandparents' home. The parents also did not make reasonable efforts to provide the child with a home that was free of drugs and the parents' actions following the removal demonstrated a lack of concern for the welfare of the child such that it is unlikely that the parents would have been able to provide a suitable home at an early date. In re Noah A., — S.W.3d —, 2020 Tenn. App. LEXIS 498 (Tenn. Ct. App. Nov. 6, 2020).

Termination of parental rights for incarcerated parents on the ground of abandonment by wanton disregard was appropriate because when the parents were not incarcerated the parents tested positive for illegal substances, failed to complete the permanency plan, failed to maintain regular visitation with the child, and ceased communication with the Tennessee Department of Children's Services prior to their incarceration. As a result, the parents abandoned the child by engaging in conduct that exhibited a wanton disregard for the child's welfare. In re Noah A., — S.W.3d —, 2020 Tenn. App. LEXIS 498 (Tenn. Ct. App. Nov. 6, 2020).

Trial court's finding of abandonment by failure to visit was proven by clear and convincing evidence because a father engaged in no more than token visitation with the child; the father visited the child at most three times during the relevant four-month period, he had no justifiable excuse for his failure to visit the child less than a handful of times, and there was no proof as to why he failed to visit more often. In re Brooklyn R., — S.W.3d —, 2020 Tenn. App. LEXIS 506 (Tenn. Ct. App. Nov. 13, 2020).

Trial court correctly found that the father abandoned the child by failing to provide support because the father knew he had an obligation to support the child, was able to work pre-incarceration, and knew how to contact the foster parents but provided the child with no more than token support during the relevant four-month period; given the father's testimony of his ability to work in multiple capacities, there was no justification for his failure to support the child financially. In re Brooklyn R., — S.W.3d —, 2020 Tenn. App. LEXIS 506 (Tenn. Ct. App. Nov. 13, 2020).

Father's pre-incarceration actions reflected a wanton disregard for the child's welfare because the father provided no more than token support to and token visitation with the child when he was not incarcerated; a caseworker observed during the father's visits that no bond existed between him and the child, and by the time of trial, the father's protracted criminal history had resulted in his losing custody of six children. In re Brooklyn R., — S.W.3d —, 2020 Tenn. App. LEXIS 506 (Tenn. Ct. App. Nov. 13, 2020).

Evidence was sufficient to support the termination of the father's parental rights based on abandonment by wanton disregard because the record was replete with evidence of the father's recidivism, as he was arrested or incarcerated numerous times during the child's life, and he was incarcerated at the time of the hearing. In re Haskel S., — S.W.3d —, 2020 Tenn. App. LEXIS 515 (Tenn. Ct. App. Nov. 18, 2020).

Trial court erred by terminating the father's parental rights based on abandonment by an incarcerated parent because it did not set out the correct four-month period so as to put the father on notice and the Tennessee Department of Children's Services withdrew the ground at trial. In re Haskel S., — S.W.3d —, 2020 Tenn. App. LEXIS 515 (Tenn. Ct. App. Nov. 18, 2020).

Clear and convincing evidence supported the trial court's determination that the father abandoned the child because it showed that he had a long history of probation violations, criminal behavior, and substance abuse, and he did not contact DCS when he was released from prison even though he knew the child was in foster care. In re Malachi M., — S.W.3d —, 2020 Tenn. App. LEXIS 527 (Tenn. Ct. App. Nov. 20, 2020).

Termination of the mother's parental rights for abandonment based on the failure to visit ground was proper because her two abbreviated visits, totaling around three hours and both of poor quality, constituted nothing more than token visitation during the four-month period. In *re Allie-Mae K.*, — S.W.3d —, 2020 Tenn. App. LEXIS 529 (Tenn. Ct. App. Nov. 24, 2020).

Termination of the mother's parental rights for abandonment based on the failure to support was proper because the mother did not file an answer raising the lack of willfulness as an affirmative defense; neither the mother nor the father offered proof as to why they were unable to pay any support or why their lack of support was not willful; and the mother waived her right to assert a lack of willfulness. In *re Allie-Mae K.*, — S.W.3d —, 2020 Tenn. App. LEXIS 529 (Tenn. Ct. App. Nov. 24, 2020).

Termination of a father's parental rights on the ground of abandonment for failure to visit was appropriate because the father did not attempt to contact the children and disappeared for months at a time. Furthermore, the father did not challenge no-contact order based on the father's continued noncompliance with the permanency plan until when the father filed a motion for visitation, and the father's frequent incarcerations did not prevent the father from contacting the children. In *re Brayden E.*, — S.W.3d —, 2020 Tenn. App. LEXIS 549 (Tenn. Ct. App. Dec. 4, 2020).

Termination of a father's parental rights on the ground of abandonment by exhibiting a wanton disregard for the children's welfare was appropriate because the father was incarcerated during part of the four months immediately preceding the filing of the termination action, and, given the father's long criminal history, the father's incarceration was part of a broader pattern of conduct that rendered him unfit or posed a risk of substantial harm to the welfare of the child. In *re Brayden E.*, — S.W.3d —, 2020 Tenn. App. LEXIS 549 (Tenn. Ct. App. Dec. 4, 2020).

Termination of the father's parental rights based on abandonment was improper because the grandparents not only prevented him from visiting the child but also attempted to wholly removed him from the child's life and refused the support he attempted to provide and thus, the grandparents could not rely on failure to visit or failure to support as a ground for termination of the father's parental rights. In *re Avagaline S.*, — S.W.3d —, 2020 Tenn. App. LEXIS 560 (Tenn. Ct. App. Dec. 11, 2020).

Termination of the parents' parental rights based on abandonment by failure to visit and failure to support was supported by evidence that the parents had not visited the child for a three year period and such failure was willful as they offered no evidence they made any attempt to arrange visitation, and the parents

failed to provide support for the child despite having the means to do so. In *re Owen C.*, — S.W.3d —, 2020 Tenn. App. LEXIS 566 (Tenn. Ct. App. Dec. 14, 2020).

Termination of the mother's parental rights was proper based on abandonment by failure to provide a suitable home because she was not able to establish a home to which the children could safely return due to her lack of parenting skills and inattentiveness to the children's needs; she did not always actively participate or implement parenting skills during the visitation she was provided; she did not provide documentation concerning a mental health assessment or continued counseling; and she never progressed to the point of having unsupervised visitation with the children. In *re Treymarion S.*, — S.W.3d —, 2020 Tenn. App. LEXIS 599 (Tenn. Ct. App. Dec. 30, 2020).

Termination of the mother's parental rights due to abandonment based on failure to provide a suitable home was supported by evidence that the mother demonstrated a lack of concern for the children to such a degree that it appeared unlikely that she would be able to provide a suitable from for the children at an early date, as the mother made little to no effort to address and meet the children's educational and psychological needs and her drug use resulted in the trial court suspending her visits with the children. In *re Katelynn S.*, — S.W.3d —, 2021 Tenn. App. LEXIS 5 (Tenn. Ct. App. Jan. 8, 2021).

Father's failure to support the child was willful, and therefore the trial court properly found that the mother and stepfather met their burden of proving abandonment by failure to support, because by his own testimony the father's attempts to support the child were token at best and it would be incorrect to say that the mother thwarted the father's attempts at support because these attempts were sporadic and the funds offered were insignificant and made only when the father felt compelled. In *re Ella H.*, — S.W.3d —, 2021 Tenn. App. LEXIS 12 (Tenn. Ct. App. Jan. 13, 2021).

Father's failure to visit the child was willful, and therefore the trial court properly found that the mother and stepfather met their burden of proving abandonment by failure to visit, because the record showed he never made a genuine effort to visit the child. The father would not commit to the mother's reasonable request of establishing a consistent visitation schedule and there was no explanation as to why he failed to pursue visitation despite ample opportunity to do so. In *re Ella H.*, — S.W.3d —, 2021 Tenn. App. LEXIS 12 (Tenn. Ct. App. Jan. 13, 2021).

Trial court erred by terminating the mother's parental rights based on failure to visit because her failure to bring enough books or specific books on visits was not a basis for sustaining the ground against her. The record

showed that she had three appropriate visits with the children during the relevant four-month time period. In re Azariah R., — S.W.3d —, 2021 Tenn. App. LEXIS 26 (Tenn. Ct. App. Jan., 27, , 2021).

Trial court erred in finding that the mother abandoned the child by failure to visit; although she only visited for a total of five hours, it was not token, as one of her visits was unexpectedly cut short by the father, and the mother's two other attempts to visit were declined by the father. Furthermore, there was communication between the mother and the child, including five set of texts instigated by the mother and three sets instigated by either the child or the father and stepmother. In re Brianna B., — S.W.3d —, 2021 Tenn. App. LEXIS 31 (Tenn. Ct. App. Feb. 2, 2021).

Trial court properly found that the mother abandoned the child because she did not show any proof of her compliance with her alcohol and drug treatment, she admitted using methamphetamine for six months, and she was able to work, but she paid no child support nor did she provide any necessary items for the child. In re Hadley R., — S.W.3d —, 2021 Tenn. App. LEXIS 61 (Tenn. Ct. App. Feb. 21, 2021).

Termination of a mother's parental rights to the mother's child on the grounds of abandonment by failure to support and abandonment by failure to visit was appropriate because there was sufficient evidence to support the trial court's findings that the mother abandoned the child by failing to visit and by failing to provide support to the child during the relevant four-month period. Furthermore, the mother failed to meet the mother's burden to show that the mother's failure to do so was not willful. In re Lucas S., — S.W.3d —, 2021 Tenn. App. LEXIS 67 (Tenn. Ct. App. Feb. 26, 2021).

Court properly terminated a mother's parental rights because the mother knew the tasks required of her to resume visitation but failed to complete them, she failed to communicate with her case worker or the juvenile court concerning her progress on the requirements, the mother had trouble maintaining stability, and the mother's inattention to the requirements she knew she must meet in order to resume visitation constituted "knowing inaction" and therefore a willful failure to visit. In re Jeremy C., — S.W.3d —, 2021 Tenn. App. LEXIS 72 (Tenn. Ct. App. Feb. 28, 2021).

Termination ground of failure to establish a suitable home was established in this case; the child had been removed from the mother by court order in 2018 and reasonable efforts over 20 months had been made by the department to help the mother establish a suitable home, including providing housing resources and referrals for mental health assessments, yet the mother failed to follow recommendations for mental health treatment and resided in various facilities that did not allow children. In re

Dominic B., — S.W.3d —, 2021 Tenn. App. LEXIS 77 (Tenn. Ct. App. Mar. 3, 2021).

Mother's parental rights were properly terminated on the ground of abandonment by failure to provide a suitable home where the mother made little effort to find appropriate housing after the children's removal, she continued to incur arrests and charges for possession of illegal substances, and she failed to address her mental health issues. In re River L., — S.W.3d —, 2021 Tenn. App. LEXIS 83 (Tenn. Ct. App. Mar. 6, 2021).

Termination of the father's parental rights was proper based on abandonment by wanton disregard as he knew of the child's existence when he engaged in criminal activity; and his criminal history did not stem from one incident and showed a broader pattern of conduct that rendered him unfit or posed a risk of substantial harm to the child's welfare. In re Sylvia H., — S.W.3d —, 2021 Tenn. App. LEXIS 112 (Tenn. Ct. App. Mar. 23, 2021).

Mother established by a preponderance of the evidence that her failure to visit was not willful and thus the court reversed the finding that the parental termination ground of abandonment by willful failure to visit was proven; although the mother could have made a greater effort, the evidence supported a finding that the father significantly interfered, as he hid his new address from her, refused to communicate with her unless the conversation was refereed, and rebuffed some of her attempts at visitation. In re Hayden F., — S.W.3d —, 2021 Tenn. App. LEXIS 119 (Tenn. Ct. App. Mar. 24, 2021).

Trial court did not err by terminating the parents' rights based on abandonment by failure to establish a suitable home because the evidence showed that the father was incarcerated at the time of trial and the mother testified that she was staying with a friend in a camper but she did not know who owned it. In re Adaleigh M., — S.W.3d —, 2021 Tenn. App. LEXIS 130 (Tenn. Ct. App. Mar. 31, 2021).

Trial court did not err by terminating the parents' rights based on abandonment by wanton disregard because he was incarcerated when the petition for termination was filed and he admitted that he had been in and out of jail since he turned 18. In re Adaleigh M., — S.W.3d —, 2021 Tenn. App. LEXIS 130 (Tenn. Ct. App. Mar. 31, 2021).

17. Substantial Noncompliance.

Termination of the mother's parental rights based on substantial noncompliance with the permanency plan was proper because, even though the mother made some initial efforts toward completing the plan, overall, she failed to substantially comply with the permanency plan despite extraordinary and extensive assistance from the caseworker as she still had not obtained stable housing with utilities; she completed a 30-day inpatient rehabilitation pro-

gram, but she refused to go to the recommended halfway house and relapsed almost immediately; she continued to test positive for methamphetamine; and she had a mental health intake but did not follow up with counseling. In *re Allie-Mae K.*, — S.W.3d —, 2020 Tenn. App. LEXIS 529 (Tenn. Ct. App. Nov. 24, 2020).

Termination of a father's parental rights on the ground of substantial noncompliance with the permanency plan was appropriate because the plan required for the father to resolve all current/pending legal issues and avoid any new criminal charges, but the father did not resolve pending legal issues and incurred additional criminal charges. The father's noncompliance with the plan was significant and substantial because the father's criminal activity was a crucial factor in the children's removal. In *re Brayden E.*, — S.W.3d —, 2020 Tenn. App. LEXIS 549 (Tenn. Ct. App. Dec. 4, 2020).

Ground of substantial noncompliance was proven against the father by clear and convincing evidence; he failed to have stable employment, a safe, stable home, and reliable transportation, and the grossly unsanitary state of the father's residence, despite efforts to assist him, attested to his lack of effort under the permanency plan. In *re Ryan J. H.*, — S.W.3d —, 2020 Tenn. App. LEXIS 582 (Tenn. Ct. App. Dec. 22, 2020).

Ground of substantial noncompliance was proven against the mother; while the mother's health problems likely contributed to her failure to comply with the permanency plan in some respects, that did not excuse her from doing what she was able to do, and she failed to explain nor did the record show why she was unable to do anything to improve the deplorable state of the home. In *re Ryan J. H.*, — S.W.3d —, 2020 Tenn. App. LEXIS 582 (Tenn. Ct. App. Dec. 22, 2020).

That mother was waiting for an answer on disability benefits did not mean she was unable to do anything else of substance under the permanency plan in the meantime, and the court declines to hold that a parent's failure to act on her permanency plan responsibilities can be excused by the fact that she is waiting on a seemingly interminable disability benefits application process to resolve. In *re Ryan J. H.*, — S.W.3d —, 2020 Tenn. App. LEXIS 582 (Tenn. Ct. App. Dec. 22, 2020).

Father's parental rights were improperly terminated based on substantial noncompliance with the permanency plan because, although he only partially met the visitation requirement, he obtained and maintained stable housing and employment, went to juvenile court to legitimate his son, completed a parenting assessment, and maintained contact with the Department of Children's Services. In *re Jaylan J.*, — S.W.3d —, 2020 Tenn. App. LEXIS 593 (Tenn. Ct. App. Dec. 22, 2020).

Termination was proper as the mother had failed to substantially comply with the goals and responsibilities of the permanency plans because she did not establish a suitable home and did not demonstrate that she could appropriately parent the children despite almost three years of assistance from the Department of Children's Services; although she did complete some tasks on the permanency plans, she failed to take the steps necessary to be awarded unsupervised visitation; and she admitted at trial that she was unable to keep the children under control during visits. In *re Treymarion S.*, — S.W.3d —, 2020 Tenn. App. LEXIS 599 (Tenn. Ct. App. Dec. 30, 2020).

Termination of the mother's parental rights based on substantial noncompliance with the permanency plan was support by evidence that the mother's parenting classes were terminated after she became noncompliant, the mother tested positive for drugs during various drug screens, and the mother's visitation remained suspended due to her failure to obtain substance abuse and mental health assessments. In *re Katelynn S.*, — S.W.3d —, 2021 Tenn. App. LEXIS 5 (Tenn. Ct. App. Jan. 8, 2021).

Ground for termination of parental rights of substantial noncompliance with the permanency plan was proven by clear and convincing evidence because the mother failed to put forward a concrete plan of supervision, which was perhaps her most crucial task under the permanency plan given the reasons the children entered state custody in the first place. In *re Azariah R.*, — S.W.3d —, 2021 Tenn. App. LEXIS 26 (Tenn. Ct. App. Jan., 27, 2021).

Mother's rights were properly terminated for substantial noncompliance with the permanency plan where during the nearly two years between the children's removal and trial, she made little to no effort to address the permanency plans' requirements, including addressing her substance abuse and mental health issues, and failure to provide proof of a suitable home. In *re River L.*, — S.W.3d —, 2021 Tenn. App. LEXIS 83 (Tenn. Ct. App. Mar. 6, 2021).

Trial court did not err by terminating the parents' rights based on substantial noncompliance because the mother failed to address her substance abuse issues, the father admitted relapsing after his release from rehab, he failed to resolve his legal issues, neither parent completed a parenting assessment, and they failed to prepare for the child's medical condition by attending neonatal abstinence syndrome training. In *re Adaleigh M.*, — S.W.3d —, 2021 Tenn. App. LEXIS 130 (Tenn. Ct. App. Mar. 31, 2021).

18. Incarcerated Parent.

Evidence was sufficient to support the termination of the father's parental rights based on his incarceration because the record established that he had been sentenced by the Georgia court to incarceration of more than 10 years

and that the child was less than eight years old when the sentence was entered. In re Jackson D., — S.W.3d —, 2020 Tenn. App. LEXIS 366 (Tenn. Ct. App. Aug. 17, 2020).

Trial court erred in terminating the father's parental rights based on abandonment because the trial court's order stated no findings with respect to abandonment during the relevant four months preceding the father's incarceration in November 2017. In re Layton W., — S.W.3d —, 2020 Tenn. App. LEXIS 445 (Tenn. Ct. App. Oct. 6, 2020).

Termination of parental rights for incarcerated parents on the ground of abandonment by wanton disregard was appropriate because when the parents were not incarcerated the parents tested positive for illegal substances, failed to complete the permanency plan, failed to maintain regular visitation with the child, and ceased communication with the Tennessee Department of Children's Services prior to their incarceration. As a result, the parents abandoned the child by engaging in conduct that exhibited a wanton disregard for the child's welfare. In re Noah A., — S.W.3d —, 2020 Tenn. App. LEXIS 498 (Tenn. Ct. App. Nov. 6, 2020).

Termination of a mother's parental rights based upon the mother's prison sentence was appropriate because the mother was sentenced to 15 years in prison when the mother's children were five and six years old, respectively. In re Scarlet W., — S.W.3d —, 2021 Tenn. App. LEXIS 16 (Tenn. Ct. App. Jan. 15, 2021).

Mother's rights were properly terminated for abandonment by an incarcerated parent; she was incarcerated at the time of the termination petition's filing and had been incarcerated during all of the four months immediately preceding the filing, plus her repeated criminal behavior resulting in incarceration and her failure to take care of the child even when she was on parole demonstrated her wanton disregard for the child's welfare. In re Malachi M., — S.W.3d —, 2021 Tenn. App. LEXIS 121 (Tenn. Ct. App. Mar. 25, 2021).

19. Parent's Mental Condition.

Clear and convincing evidence supported the trial court's termination of the mother's parental rights based on mental incompetence to parent the child because the mother stipulated that the child was dependent and neglected in her custody because her intellectual disabilities rendered it difficult to provide the child with appropriate medical care, the mother testified that her sister maintained a conservatorship over her and managed her finances because she was unable to do so, and the mother admitted that she was often unable to understand what doctors and nurses told her and that she required another adult to attend doctor's appointments with her. In re Katrina S., — S.W.3d —,

2020 Tenn. App. LEXIS 398 (Tenn. Ct. App. Sept. 3, 2020).

Evidence was sufficient to support the termination of the mother's parental rights based on mental incompetence because, while her intellectual disability alone may not have risen to the level of mental incompetence so as to justify termination, her intellectual disability, in connection with her borderline personality disorder, intermittent explosive disorder, and her denial of any mental health issues, prevented her from ever being able to adequately provide and care for the children. In re Dyllon M., — S.W.3d —, 2020 Tenn. App. LEXIS 513 (Tenn. Ct. App. Nov. 18, 2020).

Evidence supported the finding that a mother was mentally incompetent to provide care and support for her children where, even after a year of supportive services, her intellectual disability and mood disorders rendered her unable to provide for her own basic needs or for the children's basic needs, she was not capable of making appropriate decisions for herself and the children, and she was unable to maintain stable housing or make good financial decisions. In re Amber R., — S.W.3d —, 2020 Tenn. App. LEXIS 597 (Tenn. Ct. App. Dec. 29, 2020).

20. Child Support.

Mother and stepfather failed to prove by clear and convincing evidence that the father willfully failed to pay support because they presented no wage statements or other evidence of the father's employment during the relevant four-month period, emails suggested that he was in treatment for alcohol addiction for part of that time, and the father's lack of employment and income was supported by his bank and credit union records. In re Mattie L., — S.W.3d —, 2020 Tenn. LEXIS 599 (Tenn. Feb. 8, 2021).

Termination of the mother's parental rights was proper based on abandonment because the mother did not provide support for the child from December 11, 2018 to April 10, 2019; she received the initial custody order that stated she had a duty to provide support for the child; she was reminded of that duty when she would attend court proceedings before the juvenile court or meetings with the family service worker; each permanency plan stated she was responsible for paying child support; and the mother provided no justifiable excuse for failing to provide support. In re Braden K., — S.W.3d —, 2020 Tenn. App. LEXIS 437 (Tenn. Ct. App. Sept. 30, 2020).

Although the father argued he was unable to afford to pay support, the father was employed and earning a good income during the relevant four-month period and was able financially to provide the child with an extravagant birthday gift. In re Roslyn W., — S.W.3d —, 2020 Tenn. App. LEXIS 453 (Tenn. Ct. App. Oct. 13, 2020).

Mother failed to establish by a preponderance of the evidence that her failure to support the child was not willful, as the mother had continued paying all of her other obligations, including a cell phone bill and medications, and there was no indication in the record where the money came from except her work as an artist and other jobs and thus, the mother should have been able to pay some financial support for the child. In *re Roslyn W.*, — S.W.3d —, 2020 Tenn. App. LEXIS 453 (Tenn. Ct. App. Oct. 13, 2020).

Burden was on the mother to prove her failure to support was not willful, which she failed to do; in the interim between the child entering petitioner's custody to petitioner being designated the new payee on the child's social security benefits, the mother never passed any of the benefits to petitioner for the child's benefit, plus a photograph of a belt and gifts that never were delivered was not child support. The ground of failure to support was proven by clear evidence, supporting termination of the mother's rights. In *re Arianna B.*, — S.W.3d —, 2020 Tenn. App. LEXIS 499 (Tenn. Ct. App. Nov. 9, 2020).

Termination ground of abandonment by failure to support was proven against the father by clear and convincing evidence; in view of his \$90 per month cigarette budget, his failure to pay \$50 per month in child support was baffling, plus he testified that he was able to work and earn a living, such that his deficient support payments constituted only token support for the child. In *re Ryan J. H.*, — S.W.3d —, 2020 Tenn. App. LEXIS 582 (Tenn. Ct. App. Dec. 22, 2020).

Trial court did not err in terminating the father's parental rights for abandonment by failure to financially support the child; trial court correctly determined that T.C.A. § 36-1-102(1)(A)(iv) applied, aggregated the father's non-incarceration time prior to the filing of the petition, and found that he had not paid any child support in the 127 days that he had been out of jail prior to the petition's filing. In *re Leilynn S.*, — S.W.3d —, 2021 Tenn. App. LEXIS 100 (Tenn. Ct. App. Mar. 16, 2021).

Parental termination ground of abandonment by failure to support was proven as the mother willfully failed to support the children; she was aware of her duty to support her children and had the ability to pay some support, but chose to prioritize other expenditures. In *re Hayden F.*, — S.W.3d —, 2021 Tenn. App. LEXIS 119 (Tenn. Ct. App. Mar. 24, 2021).

21. Child Abuse.

Termination of a father's parental rights was appropriate because, while the father may have taken steps to stop the father's use of drugs and to remove the father's father from the father's life, clear and convincing evidence supported the finding that the father had committed se-

vere child abuse as the child was present during incidents of domestic violence at the home of the father's parents and the father had taken the child with the father to places where the father used or acquired drugs. In *re Adalee H.*, — S.W.3d —, 2020 Tenn. App. LEXIS 356 (Tenn. Ct. App. Aug. 7, 2020).

Mother and the department were parties to the dependency and neglect case and the issue of whether the mother committed severe abuse was litigated in that case; therefore, the issue of whether she committed severe abuse was res judicata, and the trial court properly found this a ground for termination. In *re Raylan W.*, — S.W.3d —, 2020 Tenn. App. LEXIS 375 (Tenn. Ct. App. Aug. 20, 2020).

In a March 2019 order, the juvenile court found that the father committed severe child abuse against two of the child's siblings for failure to protect them from their mother's drug exposure; as the father did not challenge the finality or validity of the order finding severe child abuse either in the proceedings below or on appeal, the ground of severe child abuse was proven by clear and convincing evidence. In *re Trinity H.*, — S.W.3d —, 2020 Tenn. App. LEXIS 388 (Tenn. Ct. App. Aug. 28, 2020).

Termination of the parents' rights based on severe abuse was supported by evidence that the parents were determined to have committed severe abuse against another child. In *re Collwynn J.*, — S.W.3d —, 2020 Tenn. App. LEXIS 562 (Tenn. Ct. App. Dec. 11, 2020).

Mother's parental rights were properly terminated because the circuit court entered an order adjudicating the children dependent and neglected and found that the mother's failure to protect the deceased child rose to the knowing requirement to establish severe abuse as to that child. In *re Jaylan J.*, — S.W.3d —, 2020 Tenn. App. LEXIS 593 (Tenn. Ct. App. Dec. 22, 2020).

Mother's parental rights were properly terminated because she received a sentence of 10 years for her conduct against her deceased child that was found under a prior court order to be severe child abuse. In *re Jaylan J.*, — S.W.3d —, 2020 Tenn. App. LEXIS 593 (Tenn. Ct. App. Dec. 22, 2020).

Trial court did not err by finding by clear and convincing evidence that the child was the victim of severe child abuse under T.C.A. § 36-1-113(g)(4) based on the parents knowingly exposing her to methamphetamine,, due to the father smoking methamphetamine in her presence and the mother knowing that he was doing so because the parents did not appeal the dependency and neglect order that found that they committed severe child abuse against the child. In *re F.S.*, — S.W.3d —, 2021 Tenn. App. LEXIS 40 (Tenn. Ct. App. Feb. 4, 2021).

Termination of a mother's parental rights was in the children's best interests because she physically abused two of the children, and she

could not provide an environment free from alcohol and controlled substances. In re Kayden A., — S.W.3d —, 2021 Tenn. App. LEXIS 46 (Tenn. Ct. App. Feb. 7, 2021).

Trial court did not err by terminating the mother's parental rights based on severe abuse because a prior order concluded that the mother had committed severe child abuse against one child, both children were adjudicated dependent and neglected, and the order was not appealed. In re Adaleigh M., — S.W.3d —, 2021 Tenn. App. LEXIS 130 (Tenn. Ct. App. Mar. 31, 2021).

Mother's severe abuse of each child was clearly and convincingly established as a ground for termination of parental rights where a prior order litigated and found that she had perpetrated severe child abuse by exposing the children to methamphetamine, and she admitted to drug use during her pregnancies. In re Greyson D., — S.W.3d —, 2021 Tenn. App. LEXIS 140 (Tenn. Ct. App. Apr. 7, 2021).

22. Failure to Manifest an Ability and Willingness to Assume Custody or Financial Responsibility.

Clear and convincing evidence supported the conclusion the father failed to manifest an ability and willingness to assume custody, T.C.A. § 36-1-113(g)(14), where his testimony established that he unable to take care of the children, did not have housing or income, and had substance abuse issues that would take at least six months to resolve, and there was no evidence of any attempt by the father to overcome the obstacles that prevented him from assuming custody of the children. In re Justin D., — S.W.3d —, 2020 Tenn. App. LEXIS 348 (Tenn. Ct. App. Aug. 4, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 593 (Tenn. Dec. 10, 2020), overruled, In re Neveah M., — S.W.3d —, 2020 Tenn. LEXIS 591 (Tenn. Dec. 10, 2020).

Clear and convincing evidence did not support the conclusion the mother failed to manifest an ability and willingness to assume custody, T.C.A. § 36-1-113(g)(14), where she provided negative drug screens, secured employment and housing, and taken steps to have her license reinstated. Those steps demonstrated that she was willing to assume custody, as she had attempted to overcome the obstacles that would have prevented her from assuming custody. In re Justin D., — S.W.3d —, 2020 Tenn. App. LEXIS 348 (Tenn. Ct. App. Aug. 4, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 593 (Tenn. Dec. 10, 2020), overruled, In re Neveah M., — S.W.3d —, 2020 Tenn. LEXIS 591 (Tenn. Dec. 10, 2020).

Termination of a father's parental rights was appropriate because the father failed to manifest an ability and willingness to assume custody or financial responsibility for the child due to the father's positive drug test and admission

that the father had been a long term user of drugs, the father had an anger management problem, the father was in arrears in child support, and returning the child to the father's custody would have posed a risk of substantial harm to the child's psychological welfare. In re Adalee H., — S.W.3d —, 2020 Tenn. App. LEXIS 356 (Tenn. Ct. App. Aug. 7, 2020).

Juvenile court properly terminated a the father's parental rights as in the best interest of the children because he failed to manifest an ability and willingness to assume custody of the children and abandoned them by engaging in conduct that exhibited a wanton disregard for their welfare by engaging in a pattern of physical violence, domestic abuse, toward the mother and one of the children, as well as other illegal or unreasonable acts, the Department of Children's Services made reasonable efforts to reunite the father with the children, the children had no meaningful relationship with the father, and a change of caretaker and physical environment was likely to have a negative effect on the children's welfare. In re Nakayia, — S.W.3d —, 2020 Tenn. App. LEXIS 359 (Tenn. Ct. App. Aug. 7, 2020).

Termination of the mother's parental rights was improper based on the failure to manifest an ability and willingness to assume custody or financial responsibility because only the mother's acts and omissions from when the law took effect to the time of the trial were material to that ground as it was not a ground for termination when the original petition was filed, and retroactively applying the amendment could deprive the mother of her vested rights as a parent; however, the facts preponderated against a finding that petitioners proved any of the essential elements to establish that ground even by a preponderance of the evidence. In re Aiden M., — S.W.3d —, 2020 Tenn. App. LEXIS 361 (Tenn. Ct. App. Aug. 11, 2020).

Trial court erred terminating a father's parental rights and in finding that termination was in the child's best interests because, although the court addressed the first element by finding that the father's constant entanglement with the law and his apparent lack of preparedness or familiarity with the child negated any ability on his part to assume legal or physical custody, the court made no specific finding as to whether placing the child in the father's legal or physical custody would pose a risk of substantial harm to the physical or psychological welfare of the child as statutorily required. In re Neveah B., — S.W.3d —, 2020 Tenn. App. LEXIS 373 (Tenn. Ct. App. Aug. 20, 2020).

Ground of failure to manifest an ability and willingness to assume custody was proven by clear and convincing evidence; the father had unresolved substance abuse and mental health issues, he was found to have committed severe child abuse against two of the child's siblings, and the child had no relationship with the

father. To remove the child from a stable environment and return her to the father's custody posed a risk of substantial harm to the child. In *re* Trinity H., — S.W.3d —, 2020 Tenn. App. LEXIS 388 (Tenn. Ct. App. Aug. 28, 2020).

Father manifested neither an ability nor a willingness to assume custody of the child, and termination was proper, as the father did not show up for trial even though he was released from jail and had notice of the proceedings. In *re* Trinity H., — S.W.3d —, 2020 Tenn. App. LEXIS 388 (Tenn. Ct. App. Aug. 28, 2020).

Clear and convincing evidence supported the trial court's termination of the mother's parental rights based on failure to manifest a willingness and ability to assume custody because she stipulated that her intellectual disabilities rendered it difficult for her to provide appropriate care to the child and the record showed that the child was unable to maintain a sufficient weight when in the mother's custody. In *re* Katrina S., — S.W.3d —, 2020 Tenn. App. LEXIS 398 (Tenn. Ct. App. Sept. 3, 2020).

Termination of the mother's parental rights was proper because, while she expressed a willingness to assume responsibility for the child, her failure to act prior to the filing of the termination petition did not support her claims or indicate any evidence of an ability to assume responsibility; she was incarcerated as a result of a probation violation while the child was in the custody of the Tennessee Department of Children's Services and was arrested again days before the termination hearing; and placing the child with her would pose a risk of substantial harm to his physical or psychological welfare given her failure to adequately address her drug abuse and his current placement in an adoptive home, the only home he had ever known. In *re* Kash F., — S.W.3d —, 2020 Tenn. App. LEXIS 399 (Tenn. Ct. App. Sept. 4, 2020).

Termination of parental rights based on failure to manifest a willingness and ability to parent was supported by evidence that the mother continued to use drugs and reside in a home with two other drug users and the father continued to use alcohol and drugs and plead guilty to multiple crimes. In *re* A.V.N., — S.W.3d —, 2020 Tenn. App. LEXIS 406 (Tenn. Ct. App. Sept. 10, 2020).

Termination of the mother's rights was proper for failure to manifest an ability and willingness to assume custody or financial responsibility for the children; the mother was given the opportunity of a trial home placement, which failed due to continued issues with cleanliness and the presence of inappropriate people, and the mother's continued inability to maintain a safe, clean home were a risk to the children's safety. In *re* Cheyenne S., — S.W.3d —, 2020 Tenn. App. LEXIS 431 (Tenn. Ct. App. Sept. 24, 2020).

Termination of the mother's parental rights was proper based on her failure to manifest either a willingness or an ability to parent the child because the mother had provided no financial support; she had continued to incur criminal charges; she continued to use illegal drugs; she failed to provide a suitable home for the child; and placing the child in the mother's custody would subject him to a risk of substantial psychological and physical harm as the child's foster parent testified at length about the child's positive progression since entering his home; and removing the child from a positive home that he was comfortable in and had grown attachments to would be detrimental to both his psychological and physical wellbeing. In *re* Braden K., — S.W.3d —, 2020 Tenn. App. LEXIS 437 (Tenn. Ct. App. Sept. 30, 2020).

Mother failed to manifest a willingness and an ability to assume legal and physical custody of the mother's child and placing the child in the mother's legal and physical custody would have posed a risk of substantial harm to the child's physical and psychological welfare. The mother failed to address the mother's substance abuse, lack of housing, and lack of income and was arrested, while the child wished to stay with the foster mother who was considering adopting the child. In *re* Meghan M.R., — S.W.3d —, 2020 Tenn. App. LEXIS 457 (Tenn. Ct. App. Oct. 16, 2020).

Trial court did not err by terminating the mother's parental rights based on her failure to manifest an ability and willingness to assume custody or financial responsibility for the child because she was unemployed for much of the time the child was in her custody, she was later incarcerated for illegal drug use, and her grandmother paid all of her housing expenses. In *re* Brantley O., — S.W.3d —, 2020 Tenn. App. LEXIS 472 (Tenn. Ct. App. Oct. 22, 2020).

Termination of parental rights based on failure to manifest an ability and willingness to personally assume custody was supported by evidence that the parents failed to manifest an ability to assume custody of the children due to their unresolved issues with unstable housing and substance abuse, and failed to make an effort to resolve those issues. In *re* Brian W., — S.W.3d —, 2020 Tenn. App. LEXIS 479 (Tenn. Ct. App. Oct. 30, 2020).

Paternal grandparents established that mother failed to manifest an ability and willingness to assume legal and physical custody and financial responsibility for her child, as the mother did not seek a return of custody after release from incarceration, was content with short, sporadic visits, and displayed no interest in her child's health, education, or well-being. In *re* Rommie H., — S.W.3d —, 2020 Tenn. App. LEXIS 480 (Tenn. Ct. App. Oct. 30, 2020).

Termination of a mother's parental rights for an inability and unwillingness to assume custody was proven by clear and convincing evi-

dence where despite her efforts, she had not been able to overcome her drug addiction and mental health issues by the time of trial, she estimated that it would take at least another 18 months to complete her 12-step program, she was expecting another child and faced numerous obstacles, and her unresolved issues with drug addiction and mental health presented a real hazard or danger to the children that was not minor, trivial, or insignificant. In re Edward R., — S.W.3d —, 2020 Tenn. App. LEXIS 496 (Tenn. Ct. App. Nov. 6, 2020).

Termination of parental rights on the ground of failure to manifest an ability and willingness to assume custody was appropriate because neither parent had a plan for housing, the parents continued to consume illegal substances, and the parents made slight progress in completing the permanency plan. Placing the child in the parents' custody would have posed a risk of substantial harm to the child's welfare as the parents did not show an ability to consistently provide necessities or a safe and proper home for the child. In re Noah A., — S.W.3d —, 2020 Tenn. App. LEXIS 498 (Tenn. Ct. App. Nov. 6, 2020).

Tennessee Department of Children's Services proved by clear and convincing evidence that a father manifested neither an ability nor a willingness to assume custody of the child because the father had been in jail consistently throughout the child's life, and during the aggregate four-month period preceding his incarceration, he failed to obtain suitable housing, provide financial support for, and visit the child. In re Brooklyn R., — S.W.3d —, 2020 Tenn. App. LEXIS 506 (Tenn. Ct. App. Nov. 13, 2020).

Tennessee Department of Children's Services proved by clear and convincing evidence that placement with the father would pose a risk of substantial physical and psychological harm to the child because a caseworker expressed serious concerns with the lack of permanency, housing, and financial stability inherent to the father's continuous criminal activity and incarceration periods; there was no bond between the child and father, and the child would be devastated if taken from her foster home. In re Brooklyn R., — S.W.3d —, 2020 Tenn. App. LEXIS 506 (Tenn. Ct. App. Nov. 13, 2020).

Evidence was sufficient to support the termination of the mother's parental rights based on failure to manifest an ability and willingness to assume custody because the record showed that the mother's intellectual disability and mood disorders prevented her from being able to adequately comprehend or retain information concerning the children's mental health issues, her intellectual disability prevented her from considering and implementing appropriate parenting decisions, and her intellectual incapacity prevented her from manifesting an ability to assume financial responsibility for the chil-

dren. In re Dyllon M., — S.W.3d —, 2020 Tenn. App. LEXIS 513 (Tenn. Ct. App. Nov. 18, 2020).

Evidence was sufficient to support the termination of the father's parental rights based on failure to manifest a willingness or ability to assume custody because his refusal to seek treatment for his drug and alcohol abuse resulted in many incarcerations which rendered him unable to parent the child, and when offered a chance to go to a treatment facility the father chose to go to jail instead. In re Haskell S., — S.W.3d —, 2020 Tenn. App. LEXIS 515 (Tenn. Ct. App. Nov. 18, 2020).

Termination of the mother's parental rights was proper because she had manifested an inability to assume custody of the children due to her unresolved issues with drug addiction, mental health problems, domestic violence, and lack of suitable housing; she had demonstrated an unwillingness to assume custody by failing to take the steps necessary to address those issues as she repeatedly refused to enter a transitional living facility or domestic violence shelter and would not return to residential rehabilitation as she did not want to be separated from the father; and her unresolved issues with drugs, mental health, domestic violence, and housing presented to the children a real hazard or danger that was not minor, trivial, or insignificant. In re Allie-Mae K., — S.W.3d —, 2020 Tenn. App. LEXIS 529 (Tenn. Ct. App. Nov. 24, 2020).

Termination of a father's parental rights for failure to manifest an ability and a willingness to assume custody of the children was appropriate because the father's willful disregard for authority frequently put the father in a position wherein the father was unable to care for the children and the father, by manifesting an unwillingness to change the father's conduct, failed to manifest a willingness to assume custody of the children. Further, placing the children with the father would have put the children at substantial risk for harm. In re Brayden E., — S.W.3d —, 2020 Tenn. App. LEXIS 549 (Tenn. Ct. App. Dec. 4, 2020).

Termination of both parents' rights based on a failure to manifest an ability and willingness to assume custody was improper because the parents had been able to care for another child, the record did not support the conclusion that placing the child in the parents' custody would pose a risk of substantial harm to her physical or psychological welfare, and the parents showed a willingness to take custody by obtaining a three bedroom home close to the grandparents to assist in a gradual transition for the child. In re Avagaline S., — S.W.3d —, 2020 Tenn. App. LEXIS 560 (Tenn. Ct. App. Dec. 11, 2020).

Even considering the mother's health and financial problems, she had undertaken little action toward assuming custody of the child, and while she had at least attempted to get on

disability benefits, applying for disability is not, by itself, a manifestation of a willingness to assume custody of the child, nor was it a cure-all for doing mostly nothing in this case otherwise; given this, and the conditions of her home as well as her unresolved mental health issues, placing the child with her would pose a significant risk to the child. In re Ryan J. H., — S.W.3d —, 2020 Tenn. App. LEXIS 582 (Tenn. Ct. App. Dec. 22, 2020).

Juvenile court did not elaborate on what actions the father undertook that showed his willingness to assume custody of the child, and instead, the father took virtually no concrete steps to assume custody of or financial responsibility for the child; given the wretched conditions of his home, and the prospect he might no longer even have a home given his chronic failure to pay rent, placing the child in his custody would pose a risk and the juvenile court erred in declining to find this ground. In re Ryan J. H., — S.W.3d —, 2020 Tenn. App. LEXIS 582 (Tenn. Ct. App. Dec. 22, 2020).

While words are not necessarily meaningless, actions are more consequential than words in assessing a parent's willingness to assume custody of or financial responsibility for a child under the termination of parental rights ground of failure to manifest an ability and willingness to assume custody of the child; if not, then merely saying "I want to assume custody of my child" could suffice to fulfill the willingness part of this prong, and the court is confident that the Tennessee General Assembly did not intend such a result. In re Ryan J. H., — S.W.3d —, 2020 Tenn. App. LEXIS 582 (Tenn. Ct. App. Dec. 22, 2020).

Mother's parental rights were improperly terminated because she manifested a willingness to assume legal and physical custody of the children; her actions demonstrated her willingness in that she filed a pro se petition to regain custody of the children and mostly complied with the requirements of the permanency plan; she had stable housing and employment, had complied with the terms of her probation, and had another child living with her apparently without incident; and there was no evidence of violence, substance abuse, or criminal activity in the mother's current home. In re Jaylan J., — S.W.3d —, 2020 Tenn. App. LEXIS 593 (Tenn. Ct. App. Dec. 22, 2020).

Termination of the mother's parental rights based on a failure to manifest an ability and willingness to assume custody was supported by evidence that, despite receiving survivor's benefits and being employed, the mother had provided financial support for only a few weeks and failed to take steps necessary to regain visitation. In re Katelynn S., — S.W.3d —, 2021 Tenn. App. LEXIS 5 (Tenn. Ct. App. Jan. 8, 2021).

Ground for termination of parental rights based on failure to manifest an ability and

willingness to assume custody was proven against the mother by clear and convincing evidence because she was unable to provide a plan for how she would be able to supervise the children, she lacked any independent income or means of transportation, and she had not successfully managed her own medical condition. In re Azariah R., — S.W.3d —, 2021 Tenn. App. LEXIS 26 (Tenn. Ct. App. Jan., 27, 2021).

Termination of a father's parental rights to the father's teenage child was appropriate because the father failed to manifest an ability and willingness to assume custody of the child in that, although the father complied with some aspects of the permanency plan, the father never addressed the obstacle that prevented the father from assuming custody?the father's physical and sexual abuse of the child. Further, placing the child in the father's care would have posed a risk of substantial harm to the physical or psychological welfare of the child. In re Brandon H., — S.W.3d —, 2021 Tenn. App. LEXIS 38 (Tenn. Ct. App. Feb. 2, 2021).

Evidence of the risk of substantial harm was less than clear and convincing, and thus the trial court erred in finding termination of the mother's parental rights proper for failure to manifest an ability and willingness to assume custody or financial responsibility; other than the father testifying to the children's disappointment with the mother over missing visits, the father presented no evidence of psychological damage or the risk of psychological harm to the child. In re Brianna B., — S.W.3d —, 2021 Tenn. App. LEXIS 31 (Tenn. Ct. App. Feb. 2, 2021).

Clear and convincing evidence showed that the father's parental rights should be terminated for failure to manifest a willingness and ability to assume custody because he had never taken any steps to assume custody, he was aware that his living conditions were unacceptable for a child, he had great difficulty caring for himself, he had difficulty managing health insurance and seeking healthcare generally, and he testified that he would not know what to feed the child if he were to assume custody. In re Tiffany B., — S.W.3d —, 2021 Tenn. App. LEXIS 58 (Tenn. Ct. App. Feb. 12, 2021).

Termination of a mother's parental rights to the mother's child on the ground of failure to manifest an ability and willingness to custody was appropriate because clear and convincing proof was provided that the mother, through the mother's continued drug use and choice of relationships, had failed to manifest a willingness to assume custody of the child. Furthermore, placing the child in the mother's custody would have posed a risk of substantial harm to the child's physical or psychological welfare. In re Lucas S., — S.W.3d —, 2021 Tenn. App. LEXIS 67 (Tenn. Ct. App. Feb. 26, 2021).

Trial court's order contained no finding that placing the child in the mother's custody would pose a risk of substantial harm to the child, which was a necessary component of the termination ground of failure to manifest an ability and willingness to personally assume custody or financial responsibility of the child, and thus this finding was vacated. In re Dominic B., — S.W.3d —, 2021 Tenn. App. LEXIS 77 (Tenn. Ct. App. Mar. 3, 2021).

Mother's rights were properly terminated based on a failure to manifest an ability and willingness to assume custody where she failed to provide any proof that the two homes she rented or owned were suitable, the mother failed to address her mental health and substance abuse issues, and thus, placing the children with the mother posed a substantial risk of exposing them to drug use. In re River L., — S.W.3d —, 2021 Tenn. App. LEXIS 83 (Tenn. Ct. App. Mar. 6, 2021).

Termination of the father's parental rights was proper as his actions and incarceration failed to show an ability or a willingness to assume custody of the child; and removing the child from her foster home and placing her with the father, who she did not know, would cause her emotional harm. In re Sylvia H., — S.W.3d —, 2021 Tenn. App. LEXIS 112 (Tenn. Ct. App. Mar. 23, 2021).

Mother's rights were properly terminated for failure to manifest an ability or willingness to assume custody of or financial responsibility for the child; at the time of the termination petition's filing, mother remained incarcerated and her release date was unknown, she had no clear plan for transportation, housing, or a steady income upon her release, and the child was thriving in his foster family. In re Malachi M., — S.W.3d —, 2021 Tenn. App. LEXIS 121 (Tenn. Ct. App. Mar. 25, 2021).

Clear and convincing evidence showed that the mother had not manifested an ability and willingness to assume custody where she did not submit to drug testing, address her substance abuse problems, obtain alternate, drug-free housing, or visit the children regularly before a no-contact order. In re Greyson D., — S.W.3d —, 2021 Tenn. App. LEXIS 140 (Tenn. Ct. App. Apr. 7, 2021).

23. Best Interests of Children.

Termination of parental rights was in the children's best interest where the evidence supported the findings that neither parent had made such an adjustment of circumstances that the children could be safely returned to the custody of either of them, maintained regular visitation, had established a meaningful relationship with the children, or consistently paid child support, and a change of caretakers and physical environment would have had a detrimental emotional and psychological effect on the children. In re Justin D., — S.W.3d —, 2020

Tenn. App. LEXIS 348 (Tenn. Ct. App. Aug. 4, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 593 (Tenn. Dec. 10, 2020), overruled, In re Neveah M., — S.W.3d —, 2020 Tenn. LEXIS 591 (Tenn. Dec. 10, 2020).

Termination of a father's parental rights was in the child's best interests because the father had drug use and anger management issues, the relationship between the father and the child had been damaged beyond repair, a counsel testified that it would have been detrimental to the child to continue with the father's visitation, there was evidence of physical and verbal altercations among the members of the father's family, and the father had a substantial child support arrearage. In re Adalee H., — S.W.3d —, 2020 Tenn. App. LEXIS 356 (Tenn. Ct. App. Aug. 7, 2020).

Termination of the mother's parental rights was in the child's best interest because the mother showed no interest in being part of the child's life; she had no meaningful relationship with the child; and it would be detrimental to the child to move from the father and his wife's home as the child created healthy familial bonds with them and had become accustomed to the physical environment, community, and schedule. In re Aiden M., — S.W.3d —, 2020 Tenn. App. LEXIS 361 (Tenn. Ct. App. Aug. 11, 2020).

Evidence was sufficient to support the trial court's finding that termination of the father's parental rights was in the child's best interest because it showed that the father had been incarcerated since the child was three years old, the mother had stopped the video visits between them when the child began exhibiting anxiety behaviors after the visits, the child had no relationship with the father at the time of trial, and even after the father's release there would be restrictions on his being around other children due to his sex offender status. In re Jackson D., — S.W.3d —, 2020 Tenn. App. LEXIS 366 (Tenn. Ct. App. Aug. 17, 2020).

Termination of the mother's parental rights was in the child's best interests; the mother had not made an adjustment of circumstances that would make it safe for her child to return to her custody, a change in caretakers would be detrimental to the child, and the child was subjected to severe abuse. While the mother's relationship with the child was meaningful, the mother had been unable to parent the child in most of the last five years and her current progress was tempered by her failure to make lasting changes in the past. In re Raylan W., — S.W.3d —, 2020 Tenn. App. LEXIS 375 (Tenn. Ct. App. Aug. 20, 2020).

Trial court's final order denying the petition for termination of the mother's parental rights was deficient because it failed to comply with this section, as it was unclear whether the trial court considered the best interests of both children, as there was no mention of one child in

the best interest analysis, and there was no indication that the trial court considered the appropriate best interests factors as to the other child. In re Rukia B., — S.W.3d —, 2020 Tenn. App. LEXIS 383 (Tenn. Ct. App. Aug. 24, 2020).

Termination of the father's parental rights was in the child's best interest; he committed severe child abuse against two of the child's siblings, and that the underlying conduct occurred against the child's siblings did not mean the child somehow would not face comparable danger were she placed in the father's care, as he had not rectified his substance abuse or mental health issues. In re Trinity H., — S.W.3d —, 2020 Tenn. App. LEXIS 388 (Tenn. Ct. App. Aug. 28, 2020).

Evidence supported the trial court's determination that termination of the mother's parental rights was in the child's best interest because the mother's problems in caring for the child persisted even after intervention by DCS, during visits the mother was typically on her phone or otherwise not engaged with the child, and the effect a change in caretakers was likely to have on the child's emotional, psychological, and medical condition was substantial. The child would likely continue to need specialized care and attention, especially regarding her diet, and her needs were being met by her foster parents, who wished to adopt her. In re Katrina S., — S.W.3d —, 2020 Tenn. App. LEXIS 398 (Tenn. Ct. App. Sept. 3, 2020).

Termination of the mother's parental rights was in the child's best interests as the mother had been arrested again in the days before the termination hearing; the child had bonded with those in his foster home and was thriving; a change of caretakers at this point in the child's life would be detrimental to his emotional condition when his adoptive home was the only home he had ever known; questions remained as to the mother's ability to provide a safe and stable home for the child as evidenced by her criminal activity and failure to seek mental health treatment; and she failed to remit child support as required. In re Kash F., — S.W.3d —, 2020 Tenn. App. LEXIS 399 (Tenn. Ct. App. Sept. 4, 2020).

Termination of parental rights was in the child's best interest because the parents failed to make sufficient change to their conduct or circumstances, as the mother continued to use illegal drugs and associate herself with other drug users, the mother required assistance obtaining and paying for housing and other essential items, and the father faced similar issues. In re A.V.N., — S.W.3d —, 2020 Tenn. App. LEXIS 406 (Tenn. Ct. App. Sept. 10, 2020).

Termination of the mother's rights was in the children's best interests; the mother continued to have an unclean home and allow inappropriate people into her home, and the children would have been adversely affected by a return

to the mother, who neglected them, as her home was an unsafe environment. In re Cheyenne S., — S.W.3d —, 2020 Tenn. App. LEXIS 431 (Tenn. Ct. App. Sept. 24, 2020).

Termination of the mother's parental rights was in the child's best interests because the child had developed a bond and attachment towards his new home; a family service worker testified that when she visited the mother's previous home there was trash and dirty dishes throughout the home, illegal drugs in multiple rooms, molded food, and broken glass in the child's room; and the mother had provided no financial support for the child. In re Braden K., — S.W.3d —, 2020 Tenn. App. LEXIS 437 (Tenn. Ct. App. Sept. 30, 2020).

Trial court's order did not reflect that the trial court considered the appropriate best interests factors for termination of parental rights set forth in the termination of parental rights statute as the trial court considered the best interest factors in the child custody statute, which addressed factors that a trial court had to consider in a suit for annulment, divorce, or separate maintenance; thus, the trial court's conclusions as to the child's best interests did not satisfy the analysis mandated by statute. In re Layton W., — S.W.3d —, 2020 Tenn. App. LEXIS 445 (Tenn. Ct. App. Oct. 6, 2020).

Termination of the mother's and the father's parental rights was in the child's best interest where the father had not maintained visitation with the child and had not paid child support, the mother had mental health issues and had not made a change in circumstances, there would be a negative effect on the child if the child's caretakers or physical environment changed, and petitioners, aunt and uncle, were able to provide stability, nurturing, and dependability. In re Rosylyn W., — S.W.3d —, 2020 Tenn. App. LEXIS 453 (Tenn. Ct. App. Oct. 13, 2020).

It was in a child's best interest for the parental rights of the child's mother to be terminated because the mother continued to use illegal drugs, had not maintained consistent visitation with the child, had not maintained stable housing, had abused or neglected the child, and had incurred criminal charges. The child was doing well with the foster mother and loved and was bonded to the foster mother who wished to adopt the child. In re Meghan M.R., — S.W.3d —, 2020 Tenn. App. LEXIS 457 (Tenn. Ct. App. Oct. 16, 2020).

Trial court did not err by finding that it was in the child's best interest to terminate the mother's parental rights because it found the mother was still conducting illegal activity in the form of regular marijuana use, placing the safety and stability of her home in question, she had not seen the child in over three years and the trial court found that a meaningful relationship between the two no longer existed at the time of trial, and it found that the father

and stepmother could provide a stable, safe, loving environment for the child. In re Jude M., — S.W.3d —, 2020 Tenn. App. LEXIS 469 (Tenn. Ct. App. Oct. 22, 2020).

Trial court did not err by finding that termination of the mother's parental rights was in the child's best interest because she continued to struggle with substance abuse, she was financially supported by her grandmother, the child had lived with the same foster family for three years who wished to adopt him, the mother had neglected the child, and there was no indication of stability in her home environment. In re Brantley O., — S.W.3d —, 2020 Tenn. App. LEXIS 472 (Tenn. Ct. App. Oct. 22, 2020).

Termination of parental rights was in the children's best interest because the parents failed to make any adjustment to their circumstances so as to make it safe for the children to return home, the parents failed to maintain regular visitation and did not have a meaningful relationship with the children, and changing the children's caretakers and physical environment would have a negative effect on their well-being. In re Brian W., — S.W.3d —, 2020 Tenn. App. LEXIS 479 (Tenn. Ct. App. Oct. 30, 2020).

Termination of the mother's parental rights was in the child's best interest, as the evidence showed that the mother never addressed her poor parenting skills, she paid no child support and her contact with the child was sporadic, the paternal grandparents, who had a strong bond with the child and had cared for the child for two-thirds of the child's life, wanted to adopt the child, the child had no meaningful relationship with the mother. In re Rommie H., — S.W.3d —, 2020 Tenn. App. LEXIS 480 (Tenn. Ct. App. Oct. 30, 2020).

Evidence was clear and convincing that termination of the mother's parental rights was in the best interest of the children where although she was in a substantially better residence than before and following a 12-step program with attendance at AA A meetings, she failed to effect a lasting adjustment in her circumstances, her relationship with the children was limited to a weekly two-hour visitation, the children had resided away from her home for the majority of their lives, changing their caretakers and physical environment was likely to have a negative impact on their well-being, and even though she was attempting to battle her addiction, there was a real risk that the children would be exposed to drug use in her home, considering that she tested positive for meth and other substances just two months before trial. In re Edward R., — S.W.3d —, 2020 Tenn. App. LEXIS 496 (Tenn. Ct. App. Nov. 6, 2020).

Termination of parental rights was in the child's best interest because the parents had unresolved drug issues and had not established suitable housing for the child; the parents did

not maintain regular visitation with the child; and the mother provided no financial support for the child, while the father provided minimal financial support for the child. Furthermore, the child had developed a bond with the foster parents and was doing well in foster care. In re Noah A., — S.W.3d —, 2020 Tenn. App. LEXIS 498 (Tenn. Ct. App. Nov. 6, 2020).

Record showed no turnaround in the mother's conditions, including her drug abuse and chaotic lifestyle, such that would make it safe for the child to be returned to her care, and the child was thriving in petitioner's home; termination of the mother's parental rights was in the child's best interest. In re Arianna B., — S.W.3d —, 2020 Tenn. App. LEXIS 499 (Tenn. Ct. App. Nov. 9, 2020).

Trial court correctly found that the best interest factors, individually and collectively, weighed in favor of termination because a father's circumstances and conduct did not improve after the child was removed from his custody two days after birth; the father did not complete the alcohol and drug assessments required by the permanency plan, failed to obtain suitable housing, and had been incarcerated for over three months by the time the petition to terminate his parental rights was filed. In re Brooklyn R., — S.W.3d —, 2020 Tenn. App. LEXIS 506 (Tenn. Ct. App. Nov. 13, 2020).

Trial court correctly found that the best interest factors, individually and collectively, weighed in favor of termination because removing the child from the foster home would adversely impact the child; the child enjoyed a safe and stable environment at her foster home and established a bond with both her foster parents and two siblings. In re Brooklyn R., — S.W.3d —, 2020 Tenn. App. LEXIS 506 (Tenn. Ct. App. Nov. 13, 2020).

Trial court correctly found that the best interest factors, individually and collectively, weighed in favor of termination because the father's actions after the birth of the child reflected a state of mind that would be detrimental to the child if he regained custody; even after losing custody of six children, the father made negligible efforts, if any, to complete his responsibilities under the permanency plans developed to regain custody of the child. In re Brooklyn R., — S.W.3d —, 2020 Tenn. App. LEXIS 506 (Tenn. Ct. App. Nov. 13, 2020).

Tennessee Department of Children's Services proved by clear and convincing evidence that terminating a father's parental rights was in the child's best interests because the father neither paid child support nor provided more than token support to the child during the relevant period, or thereafter. In re Brooklyn R., — S.W.3d —, 2020 Tenn. App. LEXIS 506 (Tenn. Ct. App. Nov. 13, 2020).

Evidence was sufficient to support the trial court's determination that termination of the

mother's parental rights was in the children's best interest because the mother failed to obtain suitable housing for herself and the children, despite the social services the mother received she was still barely able to function and care for herself let alone the children, and the mother's diagnoses of an intellectual disability and mood disorders will be lifelong struggles for her that could not be overcome with social services. *In re Dyllon M.*, — S.W.3d —, 2020 Tenn. App. LEXIS 513 (Tenn. Ct. App. Nov. 18, 2020).

Evidence was sufficient to support the trial court's determination that termination of the father's parental rights was in the child's best interest because the father failed to make any change in his lifestyle and has refused any offer of assistance by the Tennessee Department of Children's Services, and he was incarcerated for most of the child's life, which rendered him unable to visit the child or to provide safe and stable housing for him. There was no meaningful relationship between the father and the child and the child had bonded with the foster family, who wished to adopt him. *In re Haskel S.*, — S.W.3d —, 2020 Tenn. App. LEXIS 515 (Tenn. Ct. App. Nov. 18, 2020).

Clear and convincing evidence supported the trial court's determination that termination of the father's parental rights was in the child's best interest because he continued criminal actions showed that he had not made an adjustment to his conduct that would allow for the child to safely reside in his home, there was no meaningful relationship between them, and the child resided with his half-siblings in the foster home with a foster mother who wished to adopt them. *In re Malachi M.*, — S.W.3d —, 2020 Tenn. App. LEXIS 527 (Tenn. Ct. App. Nov. 20, 2020).

Termination was in the children's best interests because the mother had not adjusted her circumstances to make it safe for the children to be in her home; to the caseworker's knowledge, the small camper in which the mother lived did not have electricity or running water, the windows and door had been broken by intruders, and it was padlocked with a chain to keep people out; the parents continued to abuse drugs and had not addressed their domestic violence issues; the mother did not maintain regular visitation with the children; and a meaningful relationship did not exist between the mother and the children. *In re Allie-Mae K.*, — S.W.3d —, 2020 Tenn. App. LEXIS 529 (Tenn. Ct. App. Nov. 24, 2020).

Termination of a father's parental rights was in the children's best interest because the father did not adjust the conduct that warranted the children's placement in foster care, the father had not seen or otherwise had contact with the children for a substantial period of time, and the children's in-home social worker testified that the children no longer talked

about the father and that the children were in a stable environment and their medical and psychological needs were being met. *In re Brayden E.*, — S.W.3d —, 2020 Tenn. App. LEXIS 549 (Tenn. Ct. App. Dec. 4, 2020).

Best interest factors weighed in favor of termination of parental rights, as the parents had not made an adjustment in their circumstances, conduct, and conditions because they were still without stable housing and had no concrete plan for obtaining same, and both continued to resist the notion they had a substance abuse problem. *In re Collwynn J.*, — S.W.3d —, 2020 Tenn. App. LEXIS 562 (Tenn. Ct. App. Dec. 11, 2020).

Termination of parental rights was in the child's best interest, as the parents failed to justify their failure to visit for three years, the child had no meaningful relationship with the parents, the parents paid no child support the entire time the child was with petitioners, the child had bonded with petitioners, and being taken from petitioners would negatively affect the child. *In re Owen C.*, — S.W.3d —, 2020 Tenn. App. LEXIS 566 (Tenn. Ct. App. Dec. 14, 2020).

Termination of the mother's parental rights was in the child's best interest; the department's efforts were not woeful in this case as the mother claimed, plus she had no meaningful relationship with the child, showed little to no interest in the child's welfare, and failed to effect a change of conditions to make it safe for the child to return home. *In re Ryan J. H.*, — S.W.3d —, 2020 Tenn. App. LEXIS 582 (Tenn. Ct. App. Dec. 22, 2020).

Children's services department was not primarily to blame for the father's failure to progress and the evidence was uncontroverted that the child was thriving in the foster mother's care; the child deserved permanency and stability, which the father showed he could not provide, and termination of the father's parental rights was in the child's best interest. *In re Ryan J. H.*, — S.W.3d —, 2020 Tenn. App. LEXIS 582 (Tenn. Ct. App. Dec. 22, 2020).

Clear and convincing evidence did not support a finding that termination of the mother's parental rights was in the best interest of her children because she had legitimated her son, had stable housing and employment, and consistently visited the children; there was no evidence to suggest that her home was not healthy and safe; she had completed numerous terms of her probation and had no violations, suggesting there was no criminal activity in the home; and there was no evidence of alcohol or substance use by the mother at any point in the history of the case. *In re Jaylan J.*, — S.W.3d —, 2020 Tenn. App. LEXIS 593 (Tenn. Ct. App. Dec. 22, 2020).

Termination of a mother's parental rights was in the children's best interest where despite noteworthy assistance, she did not have a

permanent residence for the children to return to, and her intellectual disability, in connection with her mood disorders, prevented her from being able to provide a safe and stable environment for the children. In *re Amber R.*, — S.W.3d —, 2020 Tenn. App. LEXIS 597 (Tenn. Ct. App. Dec. 29, 2020).

Termination of the mother's parental rights was in the children's best interests because she failed to demonstrate, following nearly three years of the Department of Children's Services assistance, that she was able to appropriately parent the children during limited, supervised visitation; removing the children from their current placements and placing them, together, in the mother's custody would have a detrimental effect on their emotional, mental, and physical well-being as they had to be placed in separate foster homes due to inappropriate sexual behavior and physical aggression between them; and the mother lacked the ability to appreciate the children's needs or to appropriately meet those needs. In *re Treymarion S.*, — S.W.3d —, 2020 Tenn. App. LEXIS 599 (Tenn. Ct. App. Dec. 30, 2020).

Termination of the mother's parental rights was in the children's best interest, as the mother failed to resolve the issues that led to removal and the children were stable and adjusting well in their foster homes and it was best for them to remain in their placements and be adopted. In *re Katelynn S.*, — S.W.3d —, 2021 Tenn. App. LEXIS 5 (Tenn. Ct. App. Jan. 8, 2021).

Trial court erred by finding that termination of the father's parental rights was not in the child's best interest because he admitted he had not seen the child in more than a year, the child did not know him to be her father, he last saw her when she was two-and-a-half years old, the child was bonded with her stepfather and was well cared for in her mother and stepfather's home, the stepfather intended to adopt the child, she had a strong sibling bond with her half brother, and the father had not provided support for the child. In *re Ella H.*, — S.W.3d —, 2021 Tenn. App. LEXIS 12 (Tenn. Ct. App. Jan. 13, 2021).

Termination of a mother's parental rights was in the children's best interest because of the mother's lengthy prison sentence, the mother's not having seen the children for two years prior to the removal of the children from the father's custody, and the children's placement in a stable, pre-adoptive home. The mother's situation made it impossible for the mother to meaningfully adjust the mother's circumstances, provide a safe and suitable home for the children, or support the children financially. In *re Scarlet W.*, — S.W.3d —, 2021 Tenn. App. LEXIS 16 (Tenn. Ct. App. Jan. 15, 2021).

Trial court did not err by finding that termination of the mother's parental rights was in the children's best interest because she had no

real plan for how to supervise them, she was not in a position to safely parent the children despite making efforts in some areas, she had shown neither the inclination nor the curiosity to inquire into their lives, and the children were thriving in their foster home. In *re Azariah R.*, — S.W.3d —, 2021 Tenn. App. LEXIS 26 (Tenn. Ct. App. Jan., 27, , 2021).

Termination of a father's parental rights was in the child's best interest because the teenage child had bonded with the foster family, the father and the child did not have a meaningful relationship, and the child had no desire to have a relationship with the father who was physically, emotionally, psychologically, and sexually abusive toward the child. In *re Brandon H.*, — S.W.3d —, 2021 Tenn. App. LEXIS 38 (Tenn. Ct. App. Feb. 2, 2021).

Clear and convincing evidence supported the trial court's finding that termination of the parents' rights was in the child's best interest because as of the trial they were still without a home and had no prospects available in the immediate future, and even though the parents visited the children on a regular basis, the evidence showed that the quality of those visits was often poor. In *re F.S.*, — S.W.3d —, 2021 Tenn. App. LEXIS 40 (Tenn. Ct. App. Feb. 4, 2021).

Evidence clearly and convincingly established that termination of the father's parental rights was in the best interests of the child because it showed that his living conditions were unsafe for a young child, there was no indication the child had ever been in the father's custody, her maternal grandmother was the only person who had ever parented the child on a daily basis, the father suffered from a mental impairment, and he struggled financially and subsisted largely on longterm disability. In *re Tiffany B.*, — S.W.3d —, 2021 Tenn. App. LEXIS 58 (Tenn. Ct. App. Feb. 12, 2021).

Termination of a mother's parental rights was in the child's best interests because due to the mother's drug use and criminal behavior throughout the child's life she had very little visitation with the child, there was no bond between the mother and the child, and the child was very bonded to the foster mother, who had cared for her and had custody of her for the majority of her life. In *re Hadley R.*, — S.W.3d —, 2021 Tenn. App. LEXIS 61 (Tenn. Ct. App. Feb. 21, 2021).

Termination of a mother's parental rights was in the child's best interest because the mother's transient lifestyle, failure to adhere to the visitation schedule, failure to provide more than token support, drug addiction, criminal record, and association and relationships with criminals indicated that it was not safe for the child to be in the mother's home. Furthermore, the child had no relationship with the mother, did not want to live with the mother, and

considered the child's stepmother to be the child's mother. In re Lucas S., — S.W.3d —, 2021 Tenn. App. LEXIS 67 (Tenn. Ct. App. Feb. 26, 2021).

Termination of a mother's parental rights was in the children's best interests because she had trouble maintaining a telephone, she did not know who her case worker was, she was engaged in abusive relationships, and despite the fact that the mother was given every opportunity to find an income-based home and to subsequently find a job, she stated she quit paying child support because she could not keep a job and could not keep a home. In re Jeremy C., — S.W.3d —, 2021 Tenn. App. LEXIS 72 (Tenn. Ct. App. Feb. 28, 2021).

Termination of the mother's parental rights was in the child's best interests, given in part that the mother did not have a suitable home, concerns surrounded her mental health, and she showed a lack of demonstrated progress, plus the child had a relationship with his foster family through his foster dad, who was his half-brother, and the family wanted to adopt him. In re Dominic B., — S.W.3d —, 2021 Tenn. App. LEXIS 77 (Tenn. Ct. App. Mar. 3, 2021).

Termination of a mother's parental rights was in the children's best interest where she failed to demonstrate that she could provide a suitable home for the children, during the 21 months prior to trial, DCS made numerous attempts to contact her via phone calls and messages on Facebook to assist her with the requirements of the permanency plans, but she never responded, the children were thriving in their current foster home, the mother was incarcerated at the time of trial, and she had failed to address her mental health and substance abuse issues. In re River L., — S.W.3d —, 2021 Tenn. App. LEXIS 83 (Tenn. Ct. App. Mar. 6, 2021).

Termination of the father's rights was in the child's best interests; his visits with the child were sporadic, he had not established a meaningful relationship with the child, plus the father did not have a stable or suitable home for the child and had an extensive history with alcohol use, which had resulted in multiple alcohol-related convictions. In re Leilyn S., — S.W.3d —, 2021 Tenn. App. LEXIS 100 (Tenn. Ct. App. Mar. 16, 2021).

Termination of the father's parental rights was in the child's best interests as the father was incarcerated, and the child was in a safe and stable home. In re Sylvia H., — S.W.3d —, 2021 Tenn. App. LEXIS 112 (Tenn. Ct. App. Mar. 23, 2021).

Termination of the mother's parental rights was in the children's best interests; the mother neglected the children by her drug abuse and nonpayment of child support, and the children were strongly bonded to the father and stepmother. Although the father was partially to blame for some of the mother's failure to visit,

overall, the evidence did not preponderate against the trial court's findings on the statutory factors. In re Hayden F., — S.W.3d —, 2021 Tenn. App. LEXIS 119 (Tenn. Ct. App. Mar. 24, 2021).

Termination of mother's rights was in the child's best interests; mother remained incarcerated for a crime she committed while pregnant and for violating her parole when the child was an infant, mother had been unable to demonstrate her sobriety outside of prison and had no plan for housing or transportation upon release, and the child did not have a meaningful relationship with mother and instead had a good relationship with his foster family. In re Malachi M., — S.W.3d —, 2021 Tenn. App. LEXIS 121 (Tenn. Ct. App. Mar. 25, 2021).

Sufficient evidence supported the trial court's finding that termination of the parents' rights was in the children's best interest because they had not made an adjustment in their lifestyle or living conditions, they had not maintained regular visitation with the children, there was a history of domestic violence between the parents and a history of use of controlled substances, the father was incarcerated, and they did not pay child support in four-month period leading up to the filing of the petition. In re Adaleigh M., — S.W.3d —, 2021 Tenn. App. LEXIS 130 (Tenn. Ct. App. Mar. 31, 2021).

Termination of a mother's parental rights was in the children's best interest where, inter alia, the mother had not made changes in her conduct or circumstances, was still using drugs, did not have appropriate housing, and her lack of visitation was due to her refusal to submit to drug tests. In re Greyson D., — S.W.3d —, 2021 Tenn. App. LEXIS 140 (Tenn. Ct. App. Apr. 7, 2021).

24. Permanency Plans.

Mother was not in substantial compliance with the requirements of the permanency plan; other than participating in visitation and having legal employment for an undetermined time, she did not complete her domestic violence classes or comply with the recommendations following her mental health evaluation, she did not keep her home free from pests and trash, and she continued to allow inappropriate people into the home. In re Cheyenne S., — S.W.3d —, 2020 Tenn. App. LEXIS 431 (Tenn. Ct. App. Sept. 24, 2020).

Trial court did not err by terminating the mother's parental rights based on noncompliance with the requirements of the permanency plan because her substance abuse caused the initial removal of the child from her custody, her positive drug test during a trial home placement led to her probation violation and subsequent incarceration, she submitted only one drug screen, and she had not completed a drug rehabilitation program. In re Brantley O.,

— S.W.3d —, 2020 Tenn. App. LEXIS 472 (Tenn. Ct. App. Oct. 22, 2020).

Record did not clearly and convincingly establish that the mother's noncompliance with the permanency plans was substantial where the Tennessee Department of Children's Services filed its petition to terminate her parental rights only eight months after developing the initial permanency plan, the overall record showed that the mother had not achieved the desired outcomes of the permanency plan in the 16-month period that passed prior to trial, but it also reflected that she had made considerable efforts, under difficult circumstances, toward addressing her instability, mental health issues, and drug use, while consistently maintaining weekly visitation with the children. In re Edward R., — S.W.3d —, 2020 Tenn. App. LEXIS 496 (Tenn. Ct. App. Nov. 6, 2020).

Although the finding as to the mother's substantial noncompliance with the permanency plans was deficient, the evidence supported the finding by showing that she made inconsistent, superficial efforts that fell far short of reaching the plans' overall goal, especially with respect to her most important responsibilities under the plans, i.e., to obtain safe and stable housing and to consistently participate in her mental health treatment. In re Amber R., — S.W.3d —, 2020 Tenn. App. LEXIS 597 (Tenn. Ct. App. Dec. 29, 2020).

26. Appellate Review.

Permanence of the child was not materially affected by the delay caused by the failure to

file a timely notice of appeal and Tenn. R. Civ. P. 60.02 procedure, and thus the trial court abused its discretion in denying the mother's motion; in light of Tennessee's policy of expediting appeals of termination cases and the fact that the parties fully briefed the substantive merits of this appeal, the court considered the case as if the trial court had entered a new order. In re Raylan W., — S.W.3d —, 2020 Tenn. App. LEXIS 375 (Tenn. Ct. App. Aug. 20, 2020).

28. Termination Improper.

Trial court's judgment terminating the father's parental rights was vacated because, although petitioners presented evidence regarding the grounds for terminating the father's rights, they failed to present any evidence regarding the child's best interest, and the trial court failed to conduct a best interest analysis and conclude by clear and convincing evidence that it was in the child's best interest to terminate the father's rights. In re Lillian W., — S.W.3d —, 2020 Tenn. App. LEXIS 500 (Tenn. Ct. App. Nov. 9, 2020).

33. Evidence Sufficient.

Mother was unable to provide a suitable home for the children where although she was provided with services to address her homelessness, mental health issues, issues with cleanliness, and trouble managing money, she either refused these services or did not use them consistently. In re Amber R., — S.W.3d —, 2020 Tenn. App. LEXIS 597 (Tenn. Ct. App. Dec. 29, 2020).

36-1-117. Parties to proceedings — Termination of rights of putative father — Consent of parent or guardian — Service of process.

NOTES TO DECISIONS

3. Parties.

Aunt and uncle were not the child's guardians within the meaning of the adoption statute and thus they were not necessary parties to the adoption proceeding, which was not void; aunt and uncle were never appointed or defined by law as the child's guardian or conservator,

given that the juvenile court's order only awarded them visitation with the child, while the grandparents were awarded temporary legal custody. In re M.L.S., — S.W.3d —, 2020 Tenn. App. LEXIS 458 (Tenn. Ct. App. Oct. 16, 2020).

36-1-121. Effect of adoption on relationship.

NOTES TO DECISIONS

10. Effect of Adoption on Other Proceedings.

Paternal great-aunt and great-uncle did not acquire an enforceable visitation right by acquiescence after entry of a final decree of adoption by maternal grandparents and a child because the adoptive parents' permission or

agreement to permit visitation did not establish enforceable rights in a related person permitted to visit. In re M.L.S., — S.W.3d —, 2020 Tenn. App. LEXIS 461 (Tenn. Ct. App. Oct. 16, 2020).

Trial court properly relied on the parties' agreed order as the source of the grandmother's

enforceable visitation rights because this section did not invalidate such an agreement. *Natasha S. v. Madison M.*, — S.W.3d —, 2021

Tenn. App. LEXIS 155 (Tenn. Ct. App. Apr. 14, 2021).

36-1-145. Written contract for post-adoption contact between certain parties — Requirements — Enforcement — Modification — Termination.

NOTES TO DECISIONS

1. Application.

Agreed order between the parties did not constitute a valid post-adoption contract agreement under this section because this section

did not apply to agreements between adoptive parents and grandparents. *Natasha S. v. Madison M.*, — S.W.3d —, 2021 Tenn. App. LEXIS 155 (Tenn. Ct. App. Apr. 14, 2021).

CHAPTER 2

PARENTAGE

PART 3 PARENTAGE AND LEGITIMATION

36-2-311. Order of parentage.

NOTES TO DECISIONS

2. Findings.

Vacating of a trial court's award of a deviation of child support was appropriate because the trial court did not make the findings required by statute and the Tennessee Child Support Guidelines. As such, the appropriate remedy was to remand to the trial court to reconsider whether a deviation was warranted,

and, if the trial court did find that a father was entitled to a deviation with regard to retroactive child support and uncovered medical expenses, the trial court was to make explicit findings *Knipper v. Enfinger*, — S.W.3d —, 2020 Tenn. App. LEXIS 393 (Tenn. Ct. App. Aug. 31, 2020).

CHAPTER 3

MARRIAGE

PART 5 PROPERTY RIGHTS OF SPOUSES

36-3-501. Enforcement of antenuptial agreements.

NOTES TO DECISIONS

3. Alimony.

Trial court did not err in finding the parties' prenuptial agreement valid; neither sophistication nor experience in business was needed to understand the terms of the agreement, including the term that neither would be entitled to alimony upon divorce. The parties had lived together for six years before marrying and the

wife knew for years that the husband would not marry without a prenuptial agreement, and the attorney who drafted the agreement explained each term to both parties and the wife made no allegation of misrepresentation. *Howell v. Howell*, — S.W.3d —, 2021 Tenn. App. LEXIS 47 (Tenn. Ct. App. Feb. 9, 2021).

PART 6 DOMESTIC ABUSE

36-3-601. Part definitions.

NOTES TO DECISIONS

1. Domestic Violence.

Trial court properly granted an order of protection to an ex-boyfriend against his ex-girlfriend because its factual findings demonstrated that the ex-boyfriend was a domestic abuse victim, that he and the ex-girlfriend were

formerly in a relationship, and that she threatened him, putting him in fear of physical harm; the record contained no evidence that would preponderate against the trial court's findings. *Thomas v. Gallman*, — S.W.3d —, 2021 Tenn. App. LEXIS 117 (Tenn. Ct. App. Mar. 24, 2021).

36-3-605. Ex parte protection order — Hearing — Extension.

NOTES TO DECISIONS

ANALYSIS

3. Order Granted.
4. Extension.

3. Order Granted.

Trial court properly granted an order of protection to an ex-boyfriend against his ex-girlfriend because its factual findings demonstrated that the ex-boyfriend was a domestic abuse victim, that he and the ex-girlfriend were formerly in a relationship, and that she threatened him, putting him in fear of physical harm; the record contained no evidence that would preponderate against the trial court's findings. *Thomas v. Gallman*, — S.W.3d —, 2021 Tenn. App. LEXIS 117 (Tenn. Ct. App. Mar. 24, 2021).

4. Extension.

Because the order of protection was set to expire on September 27, 2019, an extension was unnecessary as a hearing was scheduled more than nine months prior, and a violation of the existing order was not demonstrated; thus, decreeing that the order would remain in effect until a de novo evidentiary hearing could be conducted did not constitute an extension of the original order under T.C.A. § 36-3-617(a)(1) and the trial court did not err by declining to award mandatory attorney's fees to appellant. *Manor v. Woodroof*, — S.W.3d —, 2021 Tenn. App. LEXIS 60 (Tenn. Ct. App. Feb. 16, 2021).

36-3-617. Protection order — Filing costs and assistance. [Effective until July 1, 2021. See the version effective on July 1, 2021.]

NOTES TO DECISIONS

ANALYSIS

1. Assessment of Costs Prohibited.
3. Construction.

1. Assessment of Costs Prohibited.

Because the order of protection was set to expire on September 27, 2019, an extension was unnecessary as a hearing was scheduled more than nine months prior, and a violation of the existing order was not demonstrated; thus, decreeing that the order would remain in effect until a de novo evidentiary hearing could be conducted did not constitute an extension of the original order under T.C.A. § 36-3-617(a)(1) and the trial court did not err by declining to award mandatory attorney's fees to appellant. *Manor v. Woodroof*, — S.W.3d —, 2021 Tenn. App. LEXIS 60 (Tenn. Ct. App. Feb. 16, 2021).

Trial court did not err by declining to award discretionary attorney's fees to appellant pursuant to T.C.A. § 36-3-617(a)(2)(A)-(B); the court did not make any specific findings that appellee knew the allegation of domestic abuse, stalking, or sexual assault was false at the time the petition was filed. *Manor v. Woodroof*, — S.W.3d —, 2021 Tenn. App. LEXIS 60 (Tenn. Ct. App. Feb. 16, 2021).

3. Construction.

Language in T.C.A. § 36-3-617(a)(1) is clear and, affording the words their natural and ordinary meaning, the court discerns no ambiguity exists; § 36-3-617(a)(1) instructs that in order to recover an award of attorney's fees, a court must issue or extend an order of protection. *Manor v. Woodroof*, — S.W.3d —, 2021 Tenn. App. LEXIS 60 (Tenn. Ct. App. Feb. 16, 2021).

36-3-617. Protection order — Filing costs and assistance. [Effective on July 1, 2021. See the version effective until July 1, 2021.]

NOTES TO DECISIONS

ANALYSIS

1. Assessment of Costs Prohibited.
3. Construction.

1. Assessment of Costs Prohibited.

Because the order of protection was set to expire on September 27, 2019, an extension was unnecessary as a hearing was scheduled more than nine months prior, and a violation of the existing order was not demonstrated; thus, decreeing that the order would remain in effect until a de novo evidentiary hearing could be conducted did not constitute an extension of the original order under T.C.A. § 36-3-617(a)(1) and the trial court did not err by declining to award mandatory attorney's fees to appellant. *Manor v. Woodroof*, — S.W.3d —, 2021 Tenn. App. LEXIS 60 (Tenn. Ct. App. Feb. 16, 2021).

Trial court did not err by declining to award discretionary attorney's fees to appellant pursuant to T.C.A. § 36-3-617(a)(2)(A)-(B); the court did not make any specific findings that appellee knew the allegation of domestic abuse, stalking, or sexual assault was false at the time the petition was filed. *Manor v. Woodroof*, — S.W.3d —, 2021 Tenn. App. LEXIS 60 (Tenn. Ct. App. Feb. 16, 2021).

3. Construction.

Language in T.C.A. § 36-3-617(a)(1) is clear and, affording the words their natural and ordinary meaning, the court discerns no ambiguity exists; § 36-3-617(a)(1) instructs that in order to recover an award of attorney's fees, a court must issue or extend an order of protection. *Manor v. Woodroof*, — S.W.3d —, 2021 Tenn. App. LEXIS 60 (Tenn. Ct. App. Feb. 16, 2021).

CHAPTER 4

DIVORCE AND ANNULMENT

36-4-104. Residence requirements.

NOTES TO DECISIONS

1. Jurisdiction.

Trial court lacked subject matter jurisdiction over the wife's divorce action because the wife had not been a resident of Tennessee for six months preceding the filing of the complaint for divorce, as the wife moved to Tennessee on

December 18, 2018 and filed her complaint on May 21, 2019 and the acts giving rise to the divorce occurred wholly in Connecticut, prior to the wife moving to Tennessee. *Pitera v. Pitera*, — S.W.3d —, 2020 Tenn. App. LEXIS 497 (Tenn. Ct. App. Nov. 6, 2020).

36-4-106. Complaint for divorce or legal separation — Temporary injunctions.

NOTES TO DECISIONS

ANALYSIS

4. Effect of Statute.
13. Temporary Injunction.

4. Effect of Statute.

Trial court did not err in treating a portion of the shareholder loans from the family business to the husband as dissipation given the husband's continued extravagant spending after the divorce proceeding was initiated, and the T.C.A. § 36-4-106 charge to preserve the marital estate. *Sima Khayatt Kholghi v. Aliabadi*, —

S.W.3d —, 2020 Tenn. App. LEXIS 417 (Tenn. Ct. App. Sept. 18, 2020).

13. Temporary Injunction.

Any alleged error in the trial court's denial of a spouse's motion to lift a temporary injunction during the pendency of a divorce proceeding was harmless because the spouse did not advise the trial court in the motion that the spouse needed access to funds to secure legal representation in the divorce action. Furthermore, the record reflected that the spouse's counsel withdrew as a result of the deterioration of the attorney-client relationship, not due to a lack of

funds. *Montgomery v. Montgomery*, — S.W.3d —, 2020 Tenn. App. LEXIS 488 (Tenn. Ct. App. Nov. 2, 2020).

36-4-121. Distribution of marital property.

NOTES TO DECISIONS

ANALYSIS

13. Marital Property.
14. —Findings.
15. Dissipation of Marital Assets.
19. Dissolution Agreements.
21. Separate Property.
22. Transmutation.
39. Modification of Award.
40. Facts Justifying Modification of Award.
42. Appeal.
43. Remand.
44. Illustrative Cases.
46. Jurisdiction.

13. Marital Property.

Trial court had subject matter jurisdiction and properly exercised that jurisdiction to order marital property in Gaza sold and the proceeds equitably distributed where the gravamen of the wife's complaint was a divorce matter. *Sekik v. Abdelnabi*, — S.W.3d —, 2021 Tenn. App. LEXIS 10 (Tenn. Ct. App. Jan. 13, 2021).

Trial court had properly divided the marital property where it considered the relevant factors for which the parties had introduced proof, and there was evidence that both parties had contributed to the maintenance and upkeep of the marital home. *Haltom v. Haltom*, — S.W.3d —, 2021 Tenn. App. LEXIS 56 (Tenn. Ct. App. Feb. 11, 2021).

14. —Findings.

Trial court erred in awarding a wife a lien to secure the wife's alimony in solido payment against various parcels of real property because the parcels were owned by limited liability companies which the husband owned and not by the husband, individually. *Barton v. Barton*, — S.W.3d —, 2020 Tenn. App. LEXIS 502 (Tenn. Ct. App. Nov. 10, 2020).

When a husband's interest in a limited liability company (LLC) was acquired during the marriage, because the trial court treated the contractual claim which the LLC was pursuing against the United States Government as an asset of the husband, separate from the value of the marital interest in the LLC, the value of the LLC and the net marital business interests were not accurately computed. *Barton v. Barton*, — S.W.3d —, 2020 Tenn. App. LEXIS 502 (Tenn. Ct. App. Nov. 10, 2020).

15. Dissipation of Marital Assets.

Trial court did not err in treating a portion of the shareholder loans from the family business to the husband as dissipation given the husband's continued extravagant spending after the divorce proceeding was initiated, and the T.C.A. § 36-4-106 charge to preserve the marital estate. *Sima Khayatt Kholghi v. Aliabadi*, — S.W.3d —, 2020 Tenn. App. LEXIS 417 (Tenn. Ct. App. Sept. 18, 2020).

Trial court did not impose liability against a husband's brother and sister-in-law for engaging in a civil conspiracy with the husband to dissipate marital assets because the wife did not allege that the brother and sister-in-law dissipated marital assets; the wife alleged that the brother and sister-in-law conspired to convey marital property and keep the funds resulting from that sale away from the wife. *Sekik v. Abdelnabi*, — S.W.3d —, 2020 Tenn. App. LEXIS 516 (Tenn. Ct. App. Nov. 18, 2020), vacated, — S.W.3d —, 2021 Tenn. App. LEXIS 11 (Tenn. Ct. App. Jan. 12, 2021), substituted opinion, — S.W.3d —, 2021 Tenn. App. LEXIS 10 (Tenn. Ct. App. Jan. 13, 2021).

Wife failed to meet her burden at trial to prove dissipation by a preponderance of the evidence concerning loans from the corporation to the husband because, even though the drastic increase in loans, coupled with the timing of the wife's filing for divorce, raised questions concerning the purpose of the loans, there was no evidence concerning how the funds were used. *Amacher v. Amacher*, — S.W.3d —, 2021 Tenn. App. LEXIS 27 (Tenn. Ct. App. Jan. 29, 2021).

Trial court did not err by failing to find that the husband dissipated marital assets by transferring proceeds from the sale of corporate assets in the amount of \$150,000 to the parties' son eight months before the wife filed for divorce because the evidence did not preponderate against the trial courts' conclusion that the husband's testimony was not impeached that he used the money to pay family bills and the son denied the receipt of funds for his use. *Amacher v. Amacher*, — S.W.3d —, 2021 Tenn. App. LEXIS 27 (Tenn. Ct. App. Jan. 29, 2021).

19. Dissolution Agreements.

Trial court did not err in awarding the wife a judgment, in connection with the equitable distribution of property, for the amount the husband owed the wife under the mediated settlement agreement; the husband failed to

establish mutual mistake and the trial court credited the wife's testimony on the issue. *Lee v. Lee*, — S.W.3d —, 2021 Tenn. App. LEXIS 35 (Tenn. Ct. App. Feb. 2, 2021).

21. Separate Property.

Trial court erred by classifying residential property as the wife's separate asset rather than a marital asset because the funds the wife used to pay the mortgage and expenses were marital assets since they were earned during the marriage, the parties used the property as their marital residence during their 10-year marriage, and the husband provided some, albeit modest, assistance in maintaining the property. *Lewis v. Lewis*, — S.W.3d —, 2020 Tenn. App. LEXIS 360 (Tenn. Ct. App. Aug. 11, 2020).

Wife's interest in her mother's home in Iran was properly considered where it was acknowledged as separate property, but was not assigned a value given the difficulty in transferring money due to the current political climate and neither party presented evidence of the value of the wife's interest. *Sima Khayatt Kholghi v. Aliabadi*, — S.W.3d —, 2020 Tenn. App. LEXIS 417 (Tenn. Ct. App. Sept. 18, 2020).

22. Transmutation.

Although the beauty shop property began as separate property, it became marital property by transmutation because the beauty shop property was used (along with the second property) to secure the purchase money loan for the second property; the loan was repaid from marital funds; the couple took out a home equity line of credit on the marital home in order to finance the improvements to the building on the beauty shop property and to purchase equipment for the wedding equipment rental business; and the property taxes on the beauty shop property were paid from a joint bank account belonging to the husband and the wife. *Binkley v. Binkley*, — S.W.3d —, 2020 Tenn. App. LEXIS 470 (Tenn. Ct. App. Oct. 22, 2020).

Trial court properly found that the moneys from the equity in the wife's house that were used as a down payment on the home that the couple purchased together had transmuted to marital property as there was no evidence of either the value of the wife's house when the husband moved in or how it had changed while the couple lived there, nor was there evidence that the wife intended to maintain the moneys as her separate property. *Haltom v. Haltom*, —

S.W.3d —, 2021 Tenn. App. LEXIS 56 (Tenn. Ct. App. Feb. 11, 2021).

39. Modification of Award.

Because the trial court intended to make a substantially equal division of the marital estate but the calculation corrections resulted in an unequal division, the trial court's order was modified by awarding the ex-husband \$56,477.23 from the sale proceeds of the lot adjoining the marital residence, which was valued at \$476,482.92, and awarding the remainder to the ex-wife, which resulted in the husband receiving 49% in marital assets and the wife receiving 51%. *Griffin v. Griffin*, — S.W.3d —, 2020 Tenn. App. LEXIS 371 (Tenn. Ct. App. Aug. 19, 2020).

40. Facts Justifying Modification of Award.

While the trial court properly denied a wife's motion to alter or amend its order, it erred in awarding the husband half the increase in value of the marital home since the marriage and half of the increase in value of the wife's pension and IRA because a 60/40 division was more equitable where the wife funded a kitchen remodel to the marital residence without help from the husband and worked overtime in an effort to complete the project before her retirement. *Brown v. Phillips*, — S.W.3d —, 2021 Tenn. App. LEXIS 126 (Tenn. Ct. App. Mar. 29, 2021).

42. Appeal.

Father provided no reason for the court to suspend the requirements of the rule, and thus his issue concerning the valuation and award of the marital home to the mother was waived. *Swick v. Swick*, — S.W.3d —, 2021 Tenn. App. LEXIS 120 (Tenn. Ct. App. Feb. 25, 2021).

43. Remand.

Because the trial court in a divorce case did not assign classifications and values to all of the relevant property subject to division in the case, the appellate court was unable to determine if the property distribution was equitable. Therefore, upon remand, the trial court was to enter an order containing sufficient findings and conclusions regarding the classification and valuation of all relevant property, including the possessory interest in the marital home, along with its analysis of the statutory factors for the property distribution. *Green v. Green*, — S.W.3d —, 2021 Tenn. App. LEXIS 150 (Tenn. Ct. App. Apr. 12, 2021).

44. Illustrative Cases.

Because the ex-husband asked the trial court to award the ex-wife 50% of the marital royalty income in order to provide the wife a monthly income of \$4,377, and, of his own volition, he then told the court that he felt so strongly about that asset that he was willing to guarantee that the wife received \$4,377 per month for up to eight years, the trial court's division of the marital estate with the guarantee regarding the marital royalty income to the wife did not constitute reversible error. *Griffin v. Griffin*, — S.W.3d —, 2020 Tenn. App. LEXIS 371 (Tenn. Ct. App. Aug. 19, 2020).

Consideration that the husband was likely to become the sole owner of the family business in dividing the marital property and awarding alimony was not error where the husband conceded that he would be the sole beneficiary of the trust in which the family business was held after his mother's death. *Sima Khayatt Kholghi v. Aliabadi*, — S.W.3d —, 2020 Tenn. App. LEXIS 417 (Tenn. Ct. App. Sept. 18, 2020).

Trial court did not err by not classifying the entire residence as marital property through the theory of transmutation because the residence was obtained by the husband as a gift of the land and his building of the house prior to the marriage, there was no mortgage on the home during the marriage, and the wife's name was never added to the deed on the home. Thus, the evidence did not preponderate against the finding that the residence was the husband's separate property but that the appreciation of the residence was marital property subject to division with the marital estate. *Abner v. Abner*, — S.W.3d —, 2020 Tenn. App. LEXIS 423 (Tenn. Ct. App. Sept. 18, 2020).

Vacating of the equalizing distribution of an in solido award, when the wife was awarded the marital residence and the husband was awarded a business specializing in the electronic customizing of cars, was appropriate because the distribution resulted in an inequitable distribution of the marital estate in favor of the wife for the short-term marriage when the trial court's basis for making the purported equalizing distribution was, in essence, a product of its inaccurate valuation of the business. *Lindsley v. Lindsley*, — S.W.3d —, 2020 Tenn. App. LEXIS 542 (Tenn. Ct. App. Nov. 30, 2020).

Court vacated the trial court's division of marital property, which awarded the wife 36% of the marital estate, because it was unclear how the trial court concluded that the wife

received a greater "investment" when no evidence was presented regarding the tax liability or the "marketability" of the property. The court was of the opinion that a division somewhat closer to equal division of the marital estate would be more appropriate and equitable given the length of the parties' marriage (33 years), the value of the parties' separate property, the wife's limited earning power, and her monthly shortfall. *Amacher v. Amacher*, — S.W.3d —, 2021 Tenn. App. LEXIS 27 (Tenn. Ct. App. Jan. 29, 2021).

Trial court's division of life insurance policies did not render the overall division inequitable; this was a long-term marriage, the husband as a physician had a much greater earning capacity than the wife and a higher likelihood of acquiring future assets, and while he shouldered the vast majority of the marital debt, the trial court took this fact into account when making its decision. *Lee v. Lee*, — S.W.3d —, 2021 Tenn. App. LEXIS 35 (Tenn. Ct. App. Feb. 2, 2021).

Court erred in its property division because the court's clearly excessive emphasis on age rather than earning capacity was improper, and the much more impactful disparity between the parties was their capacity to acquire future assets or income; the husband was a partner at a law firm and earned over a million dollars a year, and the wife was a staff attorney who made considerable career sacrifices during the marriage and earned far less than the husband. *Julie C.W. v. Mitchell W.*, — S.W.3d —, 2021 Tenn. App. LEXIS 69 (Tenn. Ct. App. Feb. 28, 2021).

46. Jurisdiction.

Trial court had jurisdiction over a divorce action and thus, properly exercised its jurisdiction to order foreign land sold and equitably divide and distribute the proceeds from the sale of the marital property because it sought to compel the husband, his brother, and his sister-in-law to convey the land so as to realize the wife's marital share of the assets transferred during the pendency of the divorce; the order did not attempt to set aside the transactions relating to the property. *Sekik v. Abdelnabi*, — S.W.3d —, 2020 Tenn. App. LEXIS 516 (Tenn. Ct. App. Nov. 18, 2020), vacated, — S.W.3d —, 2021 Tenn. App. LEXIS 11 (Tenn. Ct. App. Jan. 12, 2021), substituted opinion, — S.W.3d —, 2021 Tenn. App. LEXIS 10 (Tenn. Ct. App. Jan. 13, 2021).

CHAPTER 5

ALIMONY AND CHILD SUPPORT

PART 1 GENERAL PROVISIONS

36-5-101. Child support order — Jurisdiction — Amount of support — Enforcement — Modification — Insurance — Scientific parentage tests.

NOTES TO DECISIONS

ANALYSIS

- 39. Age of Child.
- 43. —Severe Disability.
- 46. —Amount of Award.

39. Age of Child.

43. —Severe Disability.

Trial court's determination that the daughter had a severe disability was affirmed because the preponderance of the evidence supported the trial court's finding that the daughter could not perform essential tasks, such as waking up in a timely manner, washing her hair, remembering to take medications, remembering to brush her teeth, transporting herself to and from work, and managing money. *Lillard v. Lillard*, — S.W.3d —, 2021 Tenn. App. LEXIS 88 (Tenn. Ct. App. Mar. 8, 2021).

It was in the daughter's best interest to continue living with her mother, and therefore the trial court's determination that the daughter was entitled to child support beyond the age of 21 was affirmed, because the mother testified that she assisted the daughter with essential tasks, the mother was the daughter's conservator, and she managed her money, provided her with transportation, and tended to her health-care needs. *Lillard v. Lillard*, — S.W.3d —, 2021 Tenn. App. LEXIS 88 (Tenn. Ct. App. Mar. 8, 2021).

46. —Amount of Award.

In calculating the husband's child support, the trial court erred in finding that he had a monthly income of \$25,102 because the wife was awarded 50% of the marital royalty income. *Griffin v. Griffin*, — S.W.3d —, 2020 Tenn. App. LEXIS 371 (Tenn. Ct. App. Aug. 19, 2020).

36-5-103. Enforcement of decree for alimony and support.

NOTES TO DECISIONS

10. Attorney Fees.

Mother was entitled to an award of fees, as the father's motion for relief was an attempt to avoid the child support modification and arrearage judgment that had been entered and it was his own actions that led to the default judgment against him; moreover, the judgment set the father's income far above the mother's and he admitted that he willfully deprived the mother of child support for a considerable period of time. *Napier v. Napier*, — S.W.3d —, 2020 Tenn. App. LEXIS 332 (Tenn. Ct. App. July 27, 2020).

Court exercised its discretion in this case to award the wife the reasonable fees she has incurred in defending the husband's appeal. *Story v. Nussbaumer-Story*, — S.W.3d —, 2020 Tenn. App. LEXIS 372 (Tenn. Ct. App. Aug. 19, 2020).

Court awarded the wife attorney fees on appeal; she was largely successful on appeal and she did not have the funds to pay her own attorney fees without causing difficulties in the

living expenses of her and the children. *Lee v. Lee*, — S.W.3d —, 2021 Tenn. App. LEXIS 35 (Tenn. Ct. App. Feb. 2, 2021).

Trial court properly and awarded a father attorney's fees under T.C.A. § 36-5-103(c) because he was the prevailing party in the underlying matter. *Mercer v. Chiarella*, — S.W.3d —, 2021 Tenn. App. LEXIS 68 (Tenn. Ct. App. Feb. 26, 2021).

Mother was entitled to attorney fees on appeal; she defended the appeal after the father sought a review of the trial court's order denying modification of the parties' parenting plan, and she requested fees based on her relative ability to pay as compared to the father and his purported bad faith in both agreeing to the parenting plan and later filing the motion to modify the plan. *Allyn v. Donahue*, — S.W.3d —, 2021 Tenn. App. LEXIS 71 (Tenn. Ct. App. Mar. 01, 2021).

In its discretion, court awarded the mother the reasonable attorney fees she incurred in defending the father's appeal. *Swick v. Swick*,

— S.W.3d —, 2021 Tenn. App. LEXIS 120 (Tenn. Ct. App. Feb. 25, 2021).

Court of appeals exercised its discretion and declined to award a mother her attorney's fees incurred on appeal because a deceased father's wife was partially successful on appeal; the mother was not entitled to an award of attorney's fees based on the marital dissolution agreement to which the wife was not a party. *McGrath v. Hester*, — S.W.3d —, 2021 Tenn. App. LEXIS 153 (Tenn. Ct. App. Apr. 14, 2021).

There was no abuse of discretion in the trial court's decision not to award attorney's fees to a mother because the mother was trying to enforce a provision of her contract with the deceased father against his wife; the wife was not

a party to the marital dissolution agreement, and, therefore, the mother was not entitled to an award of attorney's fees from the wife in the trial court based on a provision from the mother and father's marital dissolution agreement. *McGrath v. Hester*, — S.W.3d —, 2021 Tenn. App. LEXIS 153 (Tenn. Ct. App. Apr. 14, 2021).

Trial court did not err by denying the wife attorney's fees because the wife sought a return to the original alimony amount, the husband requested a reduction or termination of alimony, and the trial court awarded both parties partial relief. *Himes v. Himes*, — S.W.3d —, 2021 Tenn. App. LEXIS 162 (Tenn. Ct. App. Apr. 20, 2021).

36-5-121. Decree for support of spouse.

NOTES TO DECISIONS

ANALYSIS

1. Alimony In Futuro.
2. Alimony In Solido.
4. Attorney Fees.
5. Modification of Spousal Support.
7. Award of Spousal Support Upheld.
11. Transitional Alimony.
15. Factors.
16. Award Improper.
18. Termination of Spousal Support.

1. Alimony In Futuro.

Ex-wife was properly awarded alimony in futuro because the ex-husband's earning capacity far exceeded that of the wife; the wife had minimal work experience due to her roles during the marriage as a caregiver and homemaker; it would be nearly impossible, even with a degree or retail employment, for the wife to increase her earning capacity to a reasonable level in light of the high standard of living the parties enjoyed during the marriage or the husband's substantial monthly income; and the husband had separate property the trial court found was worth \$1 million or more; however, the alimony award was vacated as sufficient findings were not made regarding the husband's ability to pay the amount of alimony awarded to the wife. *Griffin v. Griffin*, — S.W.3d —, 2020 Tenn. App. LEXIS 371 (Tenn. Ct. App. Aug. 19, 2020).

On appeal, neither party disputed the type of alimony awarded, and the evidence supported the trial court's finding that the wife would not be able to support herself at any level near that enjoyed during the marriage; thus, an award of alimony in futuro was appropriate in this case. *Ellis v. Ellis*, — S.W.3d —, 2020 Tenn. App. LEXIS 387 (Tenn. Ct. App. Aug. 27, 2020).

Contrary to the court's mandate, the trial court's adjustment of alimony did not account

for the wife's relative earning capacity, but in view of the circumstances, including the wife's age, work experience, the number of years she had not worked outside the home, and the training she would need to re-enter the workforce, the court adopted the wife's expert's opinion that she was capable of earning \$2,326.00 per month, and the order was modified to reflect an award of \$5,674.00 per month in alimony in futuro. *Ellis v. Ellis*, — S.W.3d —, 2020 Tenn. App. LEXIS 387 (Tenn. Ct. App. Aug. 27, 2020).

Award of alimony in futuro was reasonable given that the wife was an economically disadvantaged spouse, with a deficit between income and earnings of approximately \$2,000 per month. *Wilson v. Wilson*, — S.W.3d —, 2020 Tenn. App. LEXIS 601 (Tenn. Ct. App. Feb. 12, 2021).

Award of alimony in futuro was upheld on appeal; while the wife was an attorney, she spent the vast majority of the marriage supporting the husband in his career as a physician, not pursuing her own, and while she made commendable progress growing her practice since the parties' separation, the husband earned nine times what the wife was expected to earn and was at fault in the marriage's demise. *Lee v. Lee*, — S.W.3d —, 2021 Tenn. App. LEXIS 35 (Tenn. Ct. App. Feb. 2, 2021).

2. Alimony In Solido.

Husband was ordered to pay \$90,000 to cover his unsecured debt, and contrary to his claim, this obligation was not alimony paid to the wife, as it was more accurately characterized as a division of marital debt; although some of the debt may have been incurred to pay for marital expenses, the husband requested that these debts be assigned to him and presented no evidence concerning the purposes for which the debt was incurred. *Story v. Nussbaumer-Story*,

— S.W.3d —, 2020 Tenn. App. LEXIS 372 (Tenn. Ct. App. Aug. 19, 2020).

Award of alimony in solido in the amount of \$1,100 per month to the wife for eight years was proper; the court placed emphasis on the parties' difference in earning capacity, the wife's physical condition, and the parties' decision during the marriage for her to stay home and homeschool their child. The husband had the ability to pay and the wife had a need for alimony, plus it did not appear that she would be enjoying a standard of living comparable to that enjoyed during the marriage or equivalent to the husband's post-divorce standard of living. *Story v. Nussbaumer-Story*, — S.W.3d —, 2020 Tenn. App. LEXIS 372 (Tenn. Ct. App. Aug. 19, 2020).

To charge the husband with the full amount of attorney fees would be inequitable in view of the fact that the pendente lite support he paid to the wife was used to pay a portion of her fees; the amount of the alimony in solido was modified accordingly. *Ellis v. Ellis*, — S.W.3d —, 2020 Tenn. App. LEXIS 387 (Tenn. Ct. App. Aug. 27, 2020).

Wife's primary share of the marital estate was the marital residence and the liquid assets she received were insufficient to cover her legal expenses without selling the marital home; the husband had the ability to pay all of the attorney fees accrued in this case, the wife did not, and thus she was entitled to some amount of alimony in solido for fees. *Ellis v. Ellis*, — S.W.3d —, 2020 Tenn. App. LEXIS 387 (Tenn. Ct. App. Aug. 27, 2020).

Trial court's award of attorney fees to the wife as alimony in solido was proper; the husband earned on average \$31,000 per month and received property valued over \$400,000 in the estate division, and he had an open line of credit. *Lee v. Lee*, — S.W.3d —, 2021 Tenn. App. LEXIS 35 (Tenn. Ct. App. Feb. 2, 2021).

4. Attorney Fees.

Given the equities between the parties, modifications to the trial court's order, and all relevant statutory factors, the wife had the ability and means to bear her own appellate costs, and her request for such costs were denied. *Ellis v. Ellis*, — S.W.3d —, 2020 Tenn. App. LEXIS 387 (Tenn. Ct. App. Aug. 27, 2020).

Amount of attorney's fees awarded was reasonable and related to the petition to reduce or terminate alimony; the trial court's failure to list in its order the factors that guided its decision, standing alone, did not merit reversal, as the court was intimately familiar with the time and effort expended by the wife's attorneys, having presided over this litigation for over four years. *Gensci v. Wiser*, — S.W.3d —, 2021 Tenn. App. LEXIS 76 (Tenn. Ct. App. Mar. 01, 2021).

5. Modification of Spousal Support.

Trial court did not err in denying the husband's modification of alimony petition as his

ability to pay remained unchanged; the court accorded great weight to the trial court's rejection of the husband's tax returns as reliable proof of his income, and despite falling business revenues, he continued to pay his personal expenses including alimony with company funds. While he might have shown a material change, he did not prove that the change was substantial. *Gensci v. Wiser*, — S.W.3d —, 2021 Tenn. App. LEXIS 76 (Tenn. Ct. App. Mar. 01, 2021).

Trial court did not abuse its discretion by failing to further reduce or terminate the husband's alimony obligation because the record was silent as to the wife's earning capacity and the husband's bald assertion that she could have obtained a part-time job was insufficient. *Himes v. Himes*, — S.W.3d —, 2021 Tenn. App. LEXIS 162 (Tenn. Ct. App. Apr. 20, 2021).

Evidence preponderated against a finding that the husband had the ability to pay additional alimony in the first two months of 2019 because, excluding income from the sale of the marital residence, he did not have a significant amount of liquid assets from which to pay additional alimony, and he needed the funds in his IRA to pay his normal monthly expenses until his social security benefits were available. The modified the trial court's retroactive judgment to \$14,000, reflecting a \$1,000 monthly increase for November 2017 through December 2018. *Himes v. Himes*, — S.W.3d —, 2021 Tenn. App. LEXIS 162 (Tenn. Ct. App. Apr. 20, 2021).

7. Award of Spousal Support Upheld.

Consideration that the husband was likely to become the sole owner of the family business in dividing the marital property and awarding alimony was not error where the husband conceded that he would be the sole beneficiary of the trust in which the family business was held after his mother's death. *Sima Khayatt Kholghi v. Aliabadi*, — S.W.3d —, 2020 Tenn. App. LEXIS 417 (Tenn. Ct. App. Sept. 18, 2020).

Alimony award was upheld where although the wife had been awarded a larger share of the marital estate, the husband was to inherit his father's share of the family business, his parents were of advanced age, the wife's earning capability was significantly less given her status as a mother and homemaker during the 30-year marriage, the husband had significant cash flow from the family business, and nothing suggested that he would not have continued access to shareholder loans from the family business. *Sima Khayatt Kholghi v. Aliabadi*, — S.W.3d —, 2020 Tenn. App. LEXIS 417 (Tenn. Ct. App. Sept. 18, 2020).

11. Transitional Alimony.

Trial court was not at fault for failing to quantify the husband's monthly expenses as he did not mention any, and the trial court did not abuse its discretion in finding that he had the

earning capacity to pay \$1,070 in transitional alimony to the wife for 36 months, plus a portion of her attorney fees; the wife, who spoke limited English and lacked job skills, had the need for the alimony, and the trial court addressed the statutory factors and provided an explanation for its decision, which was within the range of acceptable alternatives. *Al Qaisi v. Alia*, — S.W.3d —, 2021 Tenn. App. LEXIS 34 (Tenn. Ct. App. Feb. 2, 2021).

Court's alimony finding was proper because it acknowledged that it was a long-term marriage, it disbelieved the wife's claimed expenses and noted that the wife left the marriage with more than \$4.4 million; therefore, there was no abuse of discretion in the trial court's award to the wife of \$5,000 per month in transitional alimony. *Julie C.W. v. Mitchell W.*, — S.W.3d —, 2021 Tenn. App. LEXIS 69 (Tenn. Ct. App. Feb. 28, 2021).

15. Factors.

Record contained a statement of income and expenses submitted by the wife only, leaving the court to piece together the evidence regarding the husband's expenses, and while he discussed his responsibility for two mortgages on the marital home pending sale of the property, payment of the debts, and division of any remaining equity, the court did not include such non-continuing expenses in the husband's expenses for purposes of calculating his ability to pay alimony. *Story v. Nussbaumer-Story*, — S.W.3d —, 2020 Tenn. App. LEXIS 372 (Tenn. Ct. App. Aug. 19, 2020).

Husband pointed to the wife's receipt of half of the profits from speculative homes he built

during the marriage and his payment of many of her expenses during the pendency of the divorce proceedings, but these expenditures were not relevant for purposes of determining the equitableness of the alimony award as they occurred while the parties were still married. *Story v. Nussbaumer-Story*, — S.W.3d —, 2020 Tenn. App. LEXIS 372 (Tenn. Ct. App. Aug. 19, 2020).

16. Award Improper.

Trial court abused its discretion as to the amount of transitional alimony awarded to a wife because, while the wife required some assistance to aid in the transition to a post-divorce reality, the court essentially imputed to the wife certain private school expenses for the parties' children in the absence of any proof that the wife would incur any such expenses. Also, because the court failed to properly account for the wife's receipt of child support, the wife's needs were significantly lower than calculated by the court. *Lindsley v. Lindsley*, — S.W.3d —, 2020 Tenn. App. LEXIS 542 (Tenn. Ct. App. Nov. 30, 2020).

18. Termination of Spousal Support.

Wife cohabited with her new husband and thus the presumption was raised that she no longer needed alimony, T.C.A. § 36-5-121(g)(2)(C); the trial court's order terminating transitional alimony did not comply with Tenn. R. Civ. P. 52.01 as it did not contain sufficient findings that showed the wife successfully rebutted the presumption. *Beasley v. Beasley*, — S.W.3d —, 2020 Tenn. App. LEXIS 465 (Tenn. Ct. App. Oct. 20, 2020).

PART 24 UNIFORM INTERSTATE FAMILY SUPPORT ACT — ESTABLISHMENT OF SUPPORT ORDER OR DETERMINATION OF PARENTAGE

36-5-2401. Establishment of support order.

NOTES TO DECISIONS

1. Jurisdiction.

Trial court had subject matter jurisdiction because no prior child support or parentage orders had previously been entered and it had personal jurisdiction over each party, as the

father resided in Tennessee and the mother had filed her Uniform Interstate Family Support Act petition in Tennessee. *State ex rel. Moody v. Roker*, — S.W.3d —, 2021 Tenn. App. LEXIS 87 (Tenn. Ct. App. Mar. 9, 2021).

36-5-2402. Proceeding to determine parentage.

NOTES TO DECISIONS

1. Jurisdiction.

Trial court had subject matter jurisdiction because no prior child support or parentage orders had previously been entered and it had personal jurisdiction over each party, as the

father resided in Tennessee and the mother had filed her Uniform Interstate Family Support Act petition in Tennessee. *State ex rel. Moody v. Roker*, — S.W.3d —, 2021 Tenn. App. LEXIS 87 (Tenn. Ct. App. Mar. 9, 2021).

CHAPTER 6

CHILD CUSTODY AND VISITATION

PART 1 GENERAL CUSTODY PROVISIONS

36-6-101. Decree for custody and support of child — Enforcement — Juvenile court jurisdiction — Presumption of parental fitness — Educational seminars.

NOTES TO DECISIONS

ANALYSIS

7. Award of Custody Proper.
38. Best Interests.
39. Change of Circumstances.
40. Material Change of Circumstances.
41. Burden of Proof.

7. Award of Custody Proper.

in light of the evidence in the record of a husband's abusive behavior and lack of concern for the financial, emotional, and physical safety of the children and the wife, there was discern no abuse of discretion in the trial court's decision to not grant the husband the rights set forth in subsection (a)(3)(B). *Sekik v. Abdelnabi*, — S.W.3d —, 2020 Tenn. App. LEXIS 516 (Tenn. Ct. App. Nov. 18, 2020), vacated, — S.W.3d —, 2021 Tenn. App. LEXIS 11 (Tenn. Ct. App. Jan. 12, 2021), substituted opinion, — S.W.3d —, 2021 Tenn. App. LEXIS 10 (Tenn. Ct. App. Jan. 13, 2021).

In light of the evidence in the record of a husband's abusive behavior and lack of concern for the financial, emotional, and physical safety of the children and the wife, there was no abuse of discretion in the trial court's decision to include the language in the parenting plan ordering that the husband would have no physical contact or video calls or to give out his children's contact information. *Sekik v. Abdelnabi*, — S.W.3d —, 2020 Tenn. App. LEXIS 516 (Tenn. Ct. App. Nov. 18, 2020), vacated, — S.W.3d —, 2021 Tenn. App. LEXIS 11 (Tenn. Ct. App. Jan. 12, 2021), substituted opinion, — S.W.3d —, 2021 Tenn. App. LEXIS 10 (Tenn. Ct. App. Jan. 13, 2021).

In light of the evidence in the record of the husband's abusive behavior and lack of concern for the financial, emotional, and physical safety of the children and the wife, there was no abuse of discretion in the court's decision to include in the parenting plan an order that the husband was to have no physical contact or video calls or to give out his children's contact information. *Sekik v. Abdelnabi*, — S.W.3d —, 2021 Tenn. App. LEXIS 10 (Tenn. Ct. App. Jan. 13, 2021).

38. Best Interests.

Evidence and the factors weighed in favor of awarding the mother more visitation than the father because his own motion to alter or amend illustrated that an equal parenting arrangement was not in the child's best interest; the request indicated that father wished to have control over that aspect of the child's life when the child is in his custody, and was an admission that the joint parenting will create inconvenience for the parties due to the distance between their respective homes. *Rajendran v. Rajendran*, — S.W.3d —, 2020 Tenn. App. LEXIS 413 (Tenn. Ct. App. Sept. 16, 2020).

Although the trial court did not clearly demarcate its transition from a consideration of whether a material change of circumstance had been established to the best interest analysis, its findings demonstrated a consideration of the relevant factors. *Drucker v. Daley*, — S.W.3d —, 2020 Tenn. App. LEXIS 536 (Tenn. Ct. App. Nov. 25, 2020).

Modification of the parenting schedule was in the child's best interest given the testimony about schools and the parents' inability to make a joint decision. *Chambers v. Chambers*, — S.W.3d —, 2021 Tenn. App. LEXIS 45 (Tenn. Ct. App. Feb. 6, 2021).

39. Change of Circumstances.

Trial court did not err by finding that the father failed to present sufficient evidence of a material change in circumstances to support a modification of the primary residential parent because the court found that incidents between the parties' child and his brother, including an incident during which the brother broke the child's arm, were normal teenage provocations between siblings and the mother did not intentionally interfere with the communication between the child and the father by temporarily taking away the child's cell phone for disciplinary purposes. *McAdams v. McAdams*, — S.W.3d —, 2020 Tenn. App. LEXIS 364 (Tenn. Ct. App. Aug. 13, 2020).

Mother's move to another county and the child's enrollment in a new school did not amount to a material change in circumstances because the mother's residence was less than

50 miles from the father's residence and did not violate the parties' parenting plan. *McAdams v. McAdams*, — S.W.3d —, 2020 Tenn. App. LEXIS 364 (Tenn. Ct. App. Aug. 13, 2020).

While a parenting plan's unworkability may be sufficient to constitute a material change of circumstances, the court cannot circumvent the statutory requirement that there must still be evidence that a change of circumstances has occurred. *Allyn v. Donahue*, — S.W.3d —, 2021 Tenn. App. LEXIS 71 (Tenn. Ct. App. Mar. 01, 2021).

There was no evidence of a material change that occurred between the entry of the final decree and the father's filing of the petition to modify barely a month later, plus the mother was open to setting a schedule for the father to visit the children. Furthermore, despite the father's testimony that he had satisfied therapy requirement in the parenting plan, he did not present proof of a successful discharge from therapy as a result of no further issues and the trial court was not able to credit his testimony. *Allyn v. Donahue*, — S.W.3d —, 2021 Tenn. App. LEXIS 71 (Tenn. Ct. App. Mar. 01, 2021).

40. Material Change of Circumstances.

Trial court did not err in finding that the father established a material change in circumstances for purposes of modifying the residential parenting schedule, given changes in the child's needs related to age and changes in the parents' location and maturity. *Drucker v. Daley*, — S.W.3d —, 2020 Tenn. App. LEXIS 536 (Tenn. Ct. App. Nov. 25, 2020).

For purposes of modifying a residential parenting schedule, a petitioner can establish that a material change of circumstances affects the child's well-being in a meaningful way through evidence of changes to the petitioner's circumstances as described in T.C.A. § 36-6-101(a)(2)(C) that will allow more parenting time and/or a better parent-child relationship in the future. *Drucker v. Daley*, — S.W.3d —, 2020 Tenn. App. LEXIS 536 (Tenn. Ct. App. Nov. 25, 2020).

Evidence did not preponderate against the trial court's finding that there was a material change of circumstances under T.C.A. § 36-6-101(a)(2)(C) given the father's undisputed testimony about his remarriage and birth of another child. *Chambers v. Chambers*, — S.W.3d —, 2021 Tenn. App. LEXIS 45 (Tenn. Ct. App. Feb. 6, 2021).

41. Burden of Proof.

Reversal of trial court's ruling excusing a father from proving a material change in circumstances due to the young age of the child if the father sought a change in parenting time in the future was appropriate because, even if the father only sought a change in the residential parenting schedule, the father had to prove by a preponderance of the evidence a material change of circumstance affecting the child's best interest. *Knipper v. Enfinger*, — S.W.3d —, 2020 Tenn. App. LEXIS 393 (Tenn. Ct. App. Aug. 31, 2020).

36-6-106. Child custody.

NOTES TO DECISIONS

ANALYSIS

2. Basis for Determination of Custody.
3. Best Interests Analysis.
11. Illustrative Cases.
12. Permanent Parenting Plan.

2. Basis for Determination of Custody.

Trial court's designation of a child's father as the child's primary residential parent was not an abuse of discretion because in determining that the father was better suited to function as the child's primary residential parent, the trial court focused heavily on the mother's alcohol-related arrests and other issues emanating from the mother's drinking as well as the presence in the mother's household of one of the youths who had previously engaged in inappropriate sexual activity with the child. *Brown v. Brown*, — S.W.3d —, 2020 Tenn. App. LEXIS 421 (Tenn. Ct. App. Sept. 18, 2020).

Trial court's decision designating the mother as the children's primary residential parent and adopting her proposed permanent parent-

ing plan was affirmed; the trial court found that seven factors favored the mother and that the father failed to comply with a court order to undergo an examination or attend a parent education seminar, and the father did not show an abuse of discretion on the trial court's part. *Swick v. Swick*, — S.W.3d —, 2021 Tenn. App. LEXIS 120 (Tenn. Ct. App. Feb. 25, 2021).

3. Best Interests Analysis.

Factor in subsection (a)(1) favored a mother, although not substantially, given that there really was no dispute that the father did have love and affection for the child; the father's testimony was not specific with regard to his relationship with the child, it appeared he sometimes declined to spend time with the child when given the opportunity, and the mother testified without dispute that the child was sometimes distressed when returning to her care. *Rajendran v. Rajendran*, — S.W.3d —, 2020 Tenn. App. LEXIS 413 (Tenn. Ct. App. Sept. 16, 2020).

Evidence and the factors weighed in favor of awarding the mother more visitation than the father because his own motion to alter or amend illustrated that an equal parenting arrangement was not in the child's best interest; the request indicated that father wished to have control over that aspect of the child's life when the child is in his custody, and was an admission that the joint parenting will create inconvenience for the parties due to the distance between their respective homes. *Rajendran v. Rajendran*, — S.W.3d —, 2020 Tenn. App. LEXIS 413 (Tenn. Ct. App. Sept. 16, 2020).

Factor in subsection (a)(10) weighed in favor of a mother because she had been the child's primary caregiver for her entire life, and the evidence was far less convincing that the father's life would not be subject to future upheaval. *Rajendran v. Rajendran*, — S.W.3d —, 2020 Tenn. App. LEXIS 413 (Tenn. Ct. App. Sept. 16, 2020).

Factor in subsection (a)(1) favored a mother because her family frequently visited, and the child was quite close to them, but the father's family was generally unable to visit; the mother also testified about the activities the child pursues in her care but the father offered no similar testimony. *Rajendran v. Rajendran*, — S.W.3d —, 2020 Tenn. App. LEXIS 413 (Tenn. Ct. App. Sept. 16, 2020).

Trial court properly reduced a father's parenting time because the matter was tried by consent, the trial court considered the statutory factors and made detailed, specific findings concerning various instances of emotional abuse that the father directed first at the mother and then at the child, the father did not demonstrate that the trial court exhibited a bias against him that undermined the trial court's decision or necessitated a new trial, and the facts in the record strongly supported the trial court's finding that it was not in the child's best interest to have significant contact with the father where the father's campaign of emotional abuse increasingly involved and affected the child due to his increased age. *In re John B.*, — S.W.3d —, 2020 Tenn. App. LEXIS 454 (Tenn. Ct. App. Oct. 15, 2020).

Modification of the parenting schedule was in the child's best interest given the testimony about schools and the parents' inability to make a joint decision. *Chambers v. Chambers*, — S.W.3d —, 2021 Tenn. App. LEXIS 45 (Tenn. Ct. App. Feb. 6, 2021).

Evidence did not preponderate against the juvenile court's finding that it was in the granddaughter's best interest to remain in DCS custody and with her foster parents because it showed that she was well-adjusted at the foster home and called the foster parents mother and father, the grandmother had a positive drug

screen more than a year after the children's removal, she failed to complete recommended treatment programs, and the granddaughter had been in her foster parents' care for almost two and a half years without incident and had been attending school and therapy. *In re Brilee E.*, — S.W.3d —, 2021 Tenn. App. LEXIS 163 (Tenn. Ct. App. Apr. 20, 2021).

11. Illustrative Cases.

Ex-wife was properly designated the primary residential parent, despite the fact that the children would have to change schools, because, for most of the marriage, the ex-husband spent only 30-40% of each year at home as he toured heavily with his band and for his songwriting career; the wife had been the primary caregiver for the children since they were born; she took them to almost all of their medical appointments; she took them to and from their extracurricular activities and procured the necessary equipment for those activities; she participated at the children's school; and, although the husband began spending more time at home, he still spent about 50% of the year traveling, and his travel schedule often changed with little notice. *Griffin v. Griffin*, — S.W.3d —, 2020 Tenn. App. LEXIS 371 (Tenn. Ct. App. Aug. 19, 2020).

12. Permanent Parenting Plan.

In light of the evidence in the record of a husband's abusive behavior and lack of concern for the financial, emotional, and physical safety of the children and the wife, there was no abuse of discretion in the trial court's decision to include the language in the parenting plan ordering that the husband would have no physical contact or video calls or to give out his children's contact information; the trial court considered the best interest factors. *Sekik v. Abdelnabi*, — S.W.3d —, 2020 Tenn. App. LEXIS 516 (Tenn. Ct. App. Nov. 18, 2020), vacated, — S.W.3d —, 2021 Tenn. App. LEXIS 11 (Tenn. Ct. App. Jan. 12, 2021), substituted opinion, — S.W.3d —, 2021 Tenn. App. LEXIS 10 (Tenn. Ct. App. Jan. 13, 2021).

Trial court did not abuse its discretion in determining a permanent parenting plan that designated the mother as the primary residential parent and allowed the mother to relocate to Mississippi because the mother's relocation to Mississippi was in the children's best interests as the mother had been the children's primary caregiver and the mother's potential rearing of the children in Mississippi came with greater employment prospects and the opportunity for the children to be around the mother's family and a larger support system. *Lindsley v. Lindsley*, — S.W.3d —, 2020 Tenn. App. LEXIS 542 (Tenn. Ct. App. Nov. 30, 2020).

36-6-108. Parental relocation.**NOTES TO DECISIONS****ANALYSIS**

2. Construction.
3. Application.
16. Illustrative Cases.

2. Construction.

As for how to calculate a distance more than 50 miles from the other parent within the state, T.C.A. § 36-6-108, such distance may be established by proof of radial mileage. Such distance may also be established by proof of driving distance that is fifty or fewer miles. *Chambers v. Chambers*, — S.W.3d —, 2021 Tenn. App. LEXIS 45 (Tenn. Ct. App. Feb. 6, 2021).

3. Application.

Trial court's finding that a mother moved more than 50 miles from the father was reversed as she had introduced a Google Map showing that the radial distance between the father's address and her new address was 39.04 miles and there was a 49-mile driving route

between the two. *Chambers v. Chambers*, — S.W.3d —, 2021 Tenn. App. LEXIS 45 (Tenn. Ct. App. Feb. 6, 2021).

16. Illustrative Cases.

Trial court did not abuse its discretion by denying the mother's request to relocate the parties' 14-year-old child to Germany and changing the primary residential parent designation from the mother to the father because it was clear from the child's testimony that he had close relationships with his family in Missouri and he did not really know anyone in Germany, the child testified that his preference was to live with his father in the U.S., and the logistical and financial challenge in maintaining visitation for the noncustodial parent when the parents lived on two different continents was substantial, and the travel challenges were magnified by the COVID-19 pandemic. *Dungey v. Dungey*, — S.W.3d —, 2020 Tenn. App. LEXIS 427 (Tenn. Ct. App. Sept. 23, 2020).

PART 2 UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT**36-6-217. Continuing jurisdiction of state courts — Jurisdiction to modify own decrees.****NOTES TO DECISIONS****2. Subject Matter Jurisdiction.**

Appellate court could not properly review the trial court's decision to exercise subject matter jurisdiction over the grandmother's petition for visitation because the record contained no specific findings by the trial court resolving the father's residence at the time the petition was

filed and his family's ongoing connection to Tennessee and the county, and the record was wholly silent as to any adjudication of the father's challenge to the trial court's subject matter jurisdiction. *In re Paisley H.*, — S.W.3d —, 2020 Tenn. App. LEXIS 407 (Tenn. Ct. App. Sept. 10, 2020).

PART 3 VISITATION**36-6-306. Grandparents' visitation rights.****NOTES TO DECISIONS****ANALYSIS**

7. Visitation Reversed.
12. Visitation Not Opposed.

7. Visitation Reversed.

Because the paternal grandmother was not a party and never petitioned the trial court to receive visitation rights with the child, it was error for the trial court to award her any such

visitation rights under this statute. *Baxter v. Rowan*, — S.W.3d —, 2020 Tenn. App. LEXIS 569 (Tenn. Ct. App. Dec. 15, 2020).

12. Visitation Not Opposed.

Because of the absence of proof that a child's mother opposed or severely reduced the visitation by the child's paternal grandparent, it was inappropriate for the grandparent to be awarded visitation with the child. *Morisch v.*

Maenner, — S.W.3d —, 2021 Tenn. App. LEXIS 113 (Tenn. Ct. App. Mar. 23, 2021).

36-6-307. Determination of best interests of child for grandparent visitations.

NOTES TO DECISIONS

1. Visitation.

Because of the absence of proof that a child's mother opposed or severely reduced the visitation by the child's paternal grandparent, it was

inappropriate for the grandparent to be awarded visitation with the child. *Morisch v. Maenner*, — S.W.3d —, 2021 Tenn. App. LEXIS 113 (Tenn. Ct. App. Mar. 23, 2021).

PART 4 PARENTING PLANS

36-6-402. Part definitions.

NOTES TO DECISIONS

2. Primary Residential Parent.

Ex-wife was properly designated the primary residential parent, despite the fact that the children would have to change schools, because, for most of the marriage, the ex-husband spent only 30-40% of each year at home as he toured heavily with his band and for his songwriting career; the wife had been the primary caregiver for the children since they were born; she took them to almost all of their medical appointments; she took them to and from their extracurricular activities and procured the necessary equipment for those activities; she participated at the children's school; and, although the husband began spending more time at home, he still spent about 50% of the year traveling, and his travel schedule often changed with little notice. *Griffin v. Griffin*, —

S.W.3d —, 2020 Tenn. App. LEXIS 371 (Tenn. Ct. App. Aug. 19, 2020).

In light of the evidence in the record of a husband's abusive behavior and lack of concern for the financial, emotional, and physical safety of the children and the wife, there was no abuse of discretion in the trial court's decision to include the language in the parenting plan ordering that the husband would have no physical contact or video calls or to give out his children's contact information. *Sekik v. Abdelnabi*, — S.W.3d —, 2020 Tenn. App. LEXIS 516 (Tenn. Ct. App. Nov. 18, 2020), vacated, — S.W.3d —, 2021 Tenn. App. LEXIS 11 (Tenn. Ct. App. Jan. 12, 2021), substituted opinion, — S.W.3d —, 2021 Tenn. App. LEXIS 10 (Tenn. Ct. App. Jan. 13, 2021).

36-6-404. Permanent parenting plan.

NOTES TO DECISIONS

ANALYSIS

- 3. Primary Residential Parent.
- 4. Permanent Parenting Plan.

3. Primary Residential Parent.

Ex-wife was properly designated the primary residential parent, despite the fact that the children would have to change schools, because, for most of the marriage, the ex-husband spent only 30-40% of each year at home as he toured heavily with his band and for his songwriting career; the wife had been the primary caregiver for the children since they were born; she took them to almost all of their medical appointments; she took them to and from their extracurricular activities and procured the necessary equipment for those activities; she

participated at the children's school; and, although the husband began spending more time at home, he still spent about 50% of the year traveling, and his travel schedule often changed with little notice. *Griffin v. Griffin*, — S.W.3d —, 2020 Tenn. App. LEXIS 371 (Tenn. Ct. App. Aug. 19, 2020).

4. Permanent Parenting Plan.

In light of the evidence in the record of a husband's abusive behavior and lack of concern for the financial, emotional, and physical safety of the children and the wife, there was no abuse of discretion in the trial court's decision to include the language in the parenting plan ordering that the husband would have no physical contact or video calls or to give out his children's contact information. *Sekik v. Abdel-*

nabi, — S.W.3d —, 2020 Tenn. App. LEXIS 516 (Tenn. Ct. App. Nov. 18, 2020), vacated, — S.W.3d —, 2021 Tenn. App. LEXIS 11 (Tenn. Ct. App. Jan. 12, 2021), substituted opinion, — S.W.3d —, 2021 Tenn. App. LEXIS 10 (Tenn. Ct. App. Jan. 13, 2021).

Trial court did not abuse its discretion in determining a permanent parenting plan that designated the mother as the primary residential parent and allowed the mother to relocate to Mississippi because the mother's relocation to Mississippi was in the children's best interests as the mother had been the children's primary caregiver and the mother's potential rearing of the children in Mississippi came with

greater employment prospects and the opportunity for the children to be around the mother's family and a larger support system. *Lindsley v. Lindsley*, — S.W.3d —, 2020 Tenn. App. LEXIS 542 (Tenn. Ct. App. Nov. 30, 2020).

In light of the evidence in the record of the husband's abusive behavior and lack of concern for the financial, emotional, and physical safety of the children and the wife, there was no abuse of discretion in the court's decision to include in the parenting plan an order that the husband was to have no physical contact or video calls or to give out his children's contact information. *Sekik v. Abdelnabi*, — S.W.3d —, 2021 Tenn. App. LEXIS 10 (Tenn. Ct. App. Jan. 13, 2021).

36-6-406. Restrictions in temporary or permanent parenting plans.

NOTES TO DECISIONS

ANALYSIS

1. Factors.
2. Permanent Parenting Plan.

1. Factors.

Trial court properly reduced a father's parenting time because the matter was tried by consent, the trial court considered the statutory factors and made detailed, specific findings concerning various instances of emotional abuse that the father directed first at the mother and then at the child, the father did not demonstrate that the trial court exhibited a bias against him that undermined the trial court's decision or necessitated a new trial, and the facts in the record strongly supported the trial court's finding that it was not in the child's best interest to have significant contact with the father where the father's campaign of emotional abuse increasingly involved and affected the child due to his increased age. *In re John B.*, — S.W.3d —, 2020 Tenn. App. LEXIS 454 (Tenn. Ct. App. Oct. 15, 2020).

2. Permanent Parenting Plan.

In light of the evidence in the record of a husband's abusive behavior and lack of concern

for the financial, emotional, and physical safety of the children and the wife, there was no abuse of discretion in the trial court's decision to include the language in the parenting plan ordering that the husband would have no physical contact or video calls or to give out his children's contact information; the trial court considered both the best interest factors as well as the factors in the statute. *Sekik v. Abdelnabi*, — S.W.3d —, 2020 Tenn. App. LEXIS 516 (Tenn. Ct. App. Nov. 18, 2020), vacated, — S.W.3d —, 2021 Tenn. App. LEXIS 11 (Tenn. Ct. App. Jan. 12, 2021), substituted opinion, — S.W.3d —, 2021 Tenn. App. LEXIS 10 (Tenn. Ct. App. Jan. 13, 2021).

Trial court did not abuse its discretion in determining a permanent parenting plan that designated the mother as the primary residential parent and allowed the mother to relocate to Mississippi because the mother's relocation to Mississippi was in the children's best interests as the mother had been the children's primary caregiver and the mother's potential rearing of the children in Mississippi came with greater employment prospects and the opportunity for the children to be around the mother's family and a larger support system. *Lindsley v. Lindsley*, — S.W.3d —, 2020 Tenn. App. LEXIS 542 (Tenn. Ct. App. Nov. 30, 2020).

36-6-407. Allocation of parenting responsibilities.

NOTES TO DECISIONS

3. Review.

In light of the decision to remand the parenting plan issue, the best course of action was to vacate the decision of the trial court awarding the parties equal parenting time and remand for reconsideration in light of the opinion of the court of appeals, the changed parenting plan,

subsection (c), and any changed circumstances that the trial court, in its discretion, chose to entertain; the parties had a serious lack of trust and sometimes an inability to cooperate. *Rajendran v. Rajendran*, — S.W.3d —, 2020 Tenn. App. LEXIS 413 (Tenn. Ct. App. Sept. 16, 2020).

TITLE 37 JUVENILES

CHAPTER 1

JUVENILE COURTS AND PROCEEDINGS

PART 1 GENERAL PROVISIONS

37-1-102. Chapter and part definitions. [Effective until July 1, 2021. See the version effective on July 1, 2021.]

NOTES TO DECISIONS

ANALYSIS

1. Abandoned Child.
2. Dependent and Neglected Child.
5. Severe Child Abuse.
7. Termination of Parental Rights.

1. Abandoned Child.

Court properly terminated a mother's parental rights because the mother knew the tasks required of her to resume visitation but failed to complete them, she failed to communicate with her case worker or the juvenile court concerning her progress on the requirements, the mother had trouble maintaining stability, and the mother's inattention to the requirements she knew she must meet in order to resume visitation constituted "knowing inaction" and therefore a willful failure to visit. In re Jeremy C., — S.W.3d —, 2021 Tenn. App. LEXIS 72 (Tenn. Ct. App. Feb. 28, 2021).

2. Dependent and Neglected Child.

Trial court did not err in finding that a mothers' children were dependent and neglected, when one child was a victim of aggravated child abuse by the father, because the court considered the mother's Alford plea to child endangerment in reaching its decision that the mother committed child endangerment as to the child and in concluding that the mother's act of child endangerment resulted in serious bodily injury to the child as a doctor testified that the child suffered brain injuries a result of abusive head trauma. In re Treylynn T., — S.W.3d —, 2020 Tenn. App. LEXIS 403 (Tenn. Ct. App. Sept. 9, 2020), rev'd, — S.W.3d —, 2020 Tenn. LEXIS 597 (Tenn. Dec. 16, 2020).

Because one of a mother's children was the victim of severe child abuse and, as such, was dependent and neglected, the mothers' other child was also a dependent and neglected child. In re Treylynn T., — S.W.3d —, 2020 Tenn. App. LEXIS 403 (Tenn. Ct. App. Sept. 9, 2020), rev'd,

— S.W.3d —, 2020 Tenn. LEXIS 597 (Tenn. Dec. 16, 2020).

Trial court's finding that the mother's failure to exercise appropriate judgment by allowing an intoxicated man whom she had only known three days into her apartment and then agreeing to give him a ride supported a finding of dependency and neglect In re Crystal W., — S.W.3d —, 2021 Tenn. App. LEXIS 19 (Tenn. Ct. App. Jan. 21, 2021).

Determination that the children were dependent and neglected as to the mother was supported by the trial court's consideration of the mother's cooperation with her case manager in taking her medication, her anger issues, her failure to understand the severity of her mental health issues as shown by her belief that she did not need her prescribed medication and was only taking them to show the court she was fit to care for her children. In re Crystal W., — S.W.3d —, 2021 Tenn. App. LEXIS 19 (Tenn. Ct. App. Jan. 21, 2021).

Circuit court properly found that the children were dependent and neglected because, although the fiancé was never convicted of sex crimes against children, he was a non-credible witness, and the evidence at trial fully supported the conclusion that he would represent a threat to the children should he have an opportunity to be around them. In re Isabella S., — S.W.3d —, 2021 Tenn. App. LEXIS 90 (Tenn. Ct. App. Mar. 10, 2021).

5. Severe Child Abuse.

While the father may have taken steps to stop the father's use of drugs and to remove the father's father from the father's life, clear and convincing evidence supported the finding that the father had committed severe child abuse because the child was present during incidents of domestic violence at the home of the father's parents and the father had taken the child with the father to places where the father used or acquired drugs. In re Adalee H., — S.W.3d —, 2020 Tenn. App. LEXIS 356 (Tenn. Ct. App. Aug. 7, 2020).

Mother's act of child endangerment resulted in serious bodily injury to the child as doctors testified that the child suffered brain injuries a result of nonaccidental and abusive head trauma. In re Treylynn T., — S.W.3d —, 2020 Tenn. App. LEXIS 403 (Tenn. Ct. App. Sept. 9, 2020), rev'd, — S.W.3d —, 2020 Tenn. LEXIS 597 (Tenn. Dec. 16, 2020).

Mother's parental rights were properly terminated because the circuit court entered an order adjudicating the children dependent and neglected and found that the mother's failure to protect the deceased child rose to the knowing requirement to establish severe abuse as to that child. In re Jaylan J., — S.W.3d —, 2020 Tenn. App. LEXIS 593 (Tenn. Ct. App. Dec. 22, 2020).

Trial court did not err by finding by clear and convincing evidence that the child was the victim of severe child abuse under T.C.A. § 36-1-113(g)(4) based on the parents knowingly exposing her to methamphetamine, due to the father smoking methamphetamine in her presence and the mother knowing that he was doing so because the parents did not appeal the dependency and neglect order that found that they committed severe child abuse against the

child. In re F.S., — S.W.3d —, 2021 Tenn. App. LEXIS 40 (Tenn. Ct. App. Feb. 4, 2021).

Trial court properly found that a child was the victim of severe child abuse at the hands of his mother when he was seven years old, that the child was dependent and neglected in her care, and entered a no-contact order against her because the in the child's forensic and therapy interviews, he made unprompted, consistent, detailed disclosures of sexual abuse perpetrated by mother and did not name any other perpetrator. In re Azhianne G., — S.W.3d —, 2021 Tenn. App. LEXIS 106 (Tenn. Ct. App. Mar. 18, 2021).

7. Termination of Parental Rights.

In a March 2019 order, the juvenile court found that the father committed severe child abuse against two of the child's siblings for failure to protect them from their mother's drug exposure; as the father did not challenge the finality or validity of the order finding severe child abuse either in the proceedings below or on appeal, the ground of severe child abuse was proven by clear and convincing evidence. In re Trinity H., — S.W.3d —, 2020 Tenn. App. LEXIS 388 (Tenn. Ct. App. Aug. 28, 2020).

37-1-102. Chapter and part definitions. [Effective on July 1, 2021. See the version effective until July 1, 2021.]

NOTES TO DECISIONS

ANALYSIS

1. Abandoned Child.
2. Dependent and Neglected Child.
5. Severe Child Abuse.
7. Termination of Parental Rights.

1. Abandoned Child.

Court properly terminated a mother's parental rights because the mother knew the tasks required of her to resume visitation but failed to complete them, she failed to communicate with her case worker or the juvenile court concerning her progress on the requirements, the mother had trouble maintaining stability, and the mother's inattention to the requirements she knew she must meet in order to resume visitation constituted "knowing inaction" and therefore a willful failure to visit. In re Jeremy C., — S.W.3d —, 2021 Tenn. App. LEXIS 72 (Tenn. Ct. App. Feb. 28, 2021).

2. Dependent and Neglected Child.

Trial court did not err in finding that a mothers' children were dependent and neglected, when one child was a victim of aggravated child abuse by the father, because the court considered the mother's Alford plea to child endangerment in reaching its decision

that the mother committed child endangerment as to the child and in concluding that the mother's act of child endangerment resulted in serious bodily injury to the child as a doctor testified that the child suffered brain injuries a result of abusive head trauma. In re Treylynn T., — S.W.3d —, 2020 Tenn. App. LEXIS 403 (Tenn. Ct. App. Sept. 9, 2020), rev'd, — S.W.3d —, 2020 Tenn. LEXIS 597 (Tenn. Dec. 16, 2020).

Because one of a mother's children was the victim of severe child abuse and, as such, was dependent and neglected, the mothers' other child was also a dependent and neglected child. In re Treylynn T., — S.W.3d —, 2020 Tenn. App. LEXIS 403 (Tenn. Ct. App. Sept. 9, 2020), rev'd, — S.W.3d —, 2020 Tenn. LEXIS 597 (Tenn. Dec. 16, 2020).

Trial court's finding that the mother's failure to exercise appropriate judgment by allowing an intoxicated man whom she had only known three days into her apartment and then agreeing to give him a ride supported a finding of dependency and neglect. In re Crystal W., — S.W.3d —, 2021 Tenn. App. LEXIS 19 (Tenn. Ct. App. Jan. 21, 2021).

Determination that the children were dependent and neglected as to the mother was supported by the trial court's consideration of the mother's cooperation with her case manager in

taking her medication, her anger issues, her failure to understand the severity of her mental health issues as shown by her belief that she did not need her prescribed medication and was only taking them to show the court she was fit to care for her children. In re Crystal W., — S.W.3d —, 2021 Tenn. App. LEXIS 19 (Tenn. Ct. App. Jan. 21, 2021).

Circuit court properly found that the children were dependent and neglected because, although the fiancé was never convicted of sex crimes against children, he was a non-credible witness, and the evidence at trial fully supported the conclusion that he would represent a threat to the children should he have an opportunity to be around them. In re Isabella S., — S.W.3d —, 2021 Tenn. App. LEXIS 90 (Tenn. Ct. App. Mar. 10, 2021).

5. Severe Child Abuse.

While the father may have taken steps to stop the father's use of drugs and to remove the father's father from the father's life, clear and convincing evidence supported the finding that the father had committed severe child abuse because the child was present during incidents of domestic violence at the home of the father's parents and the father had taken the child with the father to places where the father used or acquired drugs. In re Adalee H., — S.W.3d —, 2020 Tenn. App. LEXIS 356 (Tenn. Ct. App. Aug. 7, 2020).

Mother's act of child endangerment resulted in serious bodily injury to the child as doctors testified that the child suffered brain injuries a result of nonaccidental and abusive head trauma. In re Treylynn T., — S.W.3d —, 2020 Tenn. App. LEXIS 403 (Tenn. Ct. App. Sept. 9, 2020), rev'd, — S.W.3d —, 2020 Tenn. LEXIS 597 (Tenn. Dec. 16, 2020).

Mother's parental rights were properly terminated because the circuit court entered an order adjudicating the children dependent and

neglected and found that the mother's failure to protect the deceased child rose to the knowing requirement to establish severe abuse as to that child. In re Jaylan J., — S.W.3d —, 2020 Tenn. App. LEXIS 593 (Tenn. Ct. App. Dec. 22, 2020).

Trial court did not err by finding by clear and convincing evidence that the child was the victim of severe child abuse under T.C.A. § 36-1-113(g)(4) based on the parents knowingly exposing her to methamphetamine, due to the father smoking methamphetamine in her presence and the mother knowing that he was doing so because the parents did not appeal the dependency and neglect order that found that they committed severe child abuse against the child. In re F.S., — S.W.3d —, 2021 Tenn. App. LEXIS 40 (Tenn. Ct. App. Feb. 4, 2021).

Trial court properly found that a child was the victim of severe child abuse at the hands of his mother when he was seven years old, that the child was dependent and neglected in her care, and entered a no-contact order against her because the in the child's forensic and therapy interviews, he made unprompted, consistent, detailed disclosures of sexual abuse perpetrated by mother and did not name any other perpetrator. In re Azhianne G., — S.W.3d —, 2021 Tenn. App. LEXIS 106 (Tenn. Ct. App. Mar. 18, 2021).

7. Termination of Parental Rights.

In a March 2019 order, the juvenile court found that the father committed severe child abuse against two of the child's siblings for failure to protect them from their mother's drug exposure; as the father did not challenge the finality or validity of the order finding severe child abuse either in the proceedings below or on appeal, the ground of severe child abuse was proven by clear and convincing evidence. In re Trinity H., — S.W.3d —, 2020 Tenn. App. LEXIS 388 (Tenn. Ct. App. Aug. 28, 2020).

37-1-129. Hearings — Judicial Diversion — Findings — Disposition of child.

NOTES TO DECISIONS

4. Clear and Convincing.

Clear and convincing evidence supported the trial court's finding that a mothers' children were dependent and neglected, when one child was a victim of aggravated child abuse by the father, because the court considered the mother's Alford plea to child endangerment in reaching its decision that the mother committed child endangerment and in concluding that the

mother's act of child endangerment resulted in serious bodily injury to the child as a doctor testified that the child suffered brain injuries a result of abusive head trauma. In re Treylynn T., — S.W.3d —, 2020 Tenn. App. LEXIS 403 (Tenn. Ct. App. Sept. 9, 2020), rev'd, — S.W.3d —, 2020 Tenn. LEXIS 597 (Tenn. Dec. 16, 2020).

37-1-130. Dependent or neglected child — Disposition.**NOTES TO DECISIONS****1. Custody Arrangements.**

In a case in which the children had been found dependent and neglected, the circuit court did not err in awarding the grandparents permanent guardianship of the children as that

arrangement was best suited to the children's protection and their physical, mental, and moral welfare, and was in their best interest. In re Isabella S., — S.W.3d —, 2021 Tenn. App. LEXIS 90 (Tenn. Ct. App. Mar. 10, 2021).

37-1-134. Transfer from juvenile court.**NOTES TO DECISIONS****12. Sufficiency of Evidence.**

Juvenile court did not err in transferring defendant to criminal court because, from the record, it appeared that the juvenile court was presented with probable cause to conclude that defendant was not committable to an institu-

tion for either the mentally disabled or the mentally ill and that the interests of the community would be best served by legal restraint. State v. Golden, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 692 (Tenn. Crim. App. Oct. 23, 2020).

37-1-159. Appeals.**NOTES TO DECISIONS****10. Dependency Proceedings.**

Trial court did not err in considering a mother's Alford plea to child endangerment, along with other evidence, in reaching its decision that the mothers' children were dependent and neglected at the time of the de novo hearing. Furthermore, the trial court did not rely solely

on the juvenile court record (specifically the Alford plea) and did consider new evidence. In re Treylynn T., — S.W.3d —, 2020 Tenn. App. LEXIS 403 (Tenn. Ct. App. Sept. 9, 2020), rev'd, — S.W.3d —, 2020 Tenn. LEXIS 597 (Tenn. Dec. 16, 2020).

37-1-166. Orders committing or retaining a child within the custody of the department of children's services — Required determinations.**NOTES TO DECISIONS****1. Reasonable Efforts.**

In a termination of parental rights case, the Department of Children's Services (DCS) made reasonable efforts to assist the mother in establishing a suitable home in the four months following removal of the children, including providing transportation and services to allow the mother to participate in supervised therapeutic visitation with the children, but she

failed to follow up on information concerning housing opportunities and obtaining a mental health assessment; she voluntarily ceased attending individual counseling during the first four months the children were in DCS custody; and she refused to participate in family counseling, even telephonically. In re Treymarion S., — S.W.3d —, 2020 Tenn. App. LEXIS 599 (Tenn. Ct. App. Dec. 30, 2020).

PART 8 PERMANENT GUARDIANSHIP

37-1-801. Power of the juvenile courts to appoint a permanent guardian.

NOTES TO DECISIONS

3. Grandparents Awarded Permanent Guardianship.

In a case in which the children had been found dependent and neglected, the circuit court did not err in awarding the grandparents permanent guardianship of the children as that

arrangement was best suited to the children's protection and their physical, mental, and moral welfare, and was in their best interest. In re Isabella S., — S.W.3d —, 2021 Tenn. App. LEXIS 90 (Tenn. Ct. App. Mar. 10, 2021).

CHAPTER 2

PLACEMENT OF JUVENILES

PART 4 FOSTER CARE

37-2-403. Contents of permanency plan — Statement of responsibilities — Collection of information on biological parents.

NOTES TO DECISIONS

2.5. Plans Met Statutory Requirements.

Children entered foster care primarily due to domestic violence and environmental neglect issues and the requirements of the mother's

permanency plan were reasonable and related to remedying these concerns. In re Cheyenne S., — S.W.3d —, 2020 Tenn. App. LEXIS 431 (Tenn. Ct. App. Sept. 24, 2020).

TITLE 39

CRIMINAL OFFENSES

CHAPTER 11

GENERAL PROVISIONS

PART 1 CONSTRUCTION

39-11-106. Title definitions.

NOTES TO DECISIONS

ANALYSIS

- 7. Force.
- 10. Intentional and Knowing.
- 11. Owner.
- 12. Serious Bodily Injury.
- 14. Evidence.
- 15. —Sufficient.
- 17. Reckless.

7. Force.

Evidence was insufficient to support defendant's rape conviction because there was no evidence of force or coercion, as the victim recanted her allegation at trial, defendant's confession included no details that could be construed as force or coercion, and the State was not permitted to use the victim's statements contained on a video recording as sub-

stantive evidence of defendant's guilt as it did not satisfy the requirements of Tenn. R. Evid. 803(26) and it did not seek the admission of the video. *State v. Wyse*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 687 (Tenn. Crim. App. Oct. 20, 2020).

Evidence was sufficient to support defendant's conviction for resisting arrest because according to both the eyewitness testimony and the body camera video defendant acted aggressively towards the officer from the outset of the incident. Defendant refused the officer's request to place his hands behind his back, he refused to get on the ground as ordered, and he physically resisted the officer's attempts to gain control of his arms and hands. *State v. Elliott*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 127 (Tenn. Crim. App. Mar. 31, 2021).

10. Intentional and Knowing.

Defendant acted with the intent to kill and with premeditation in that defendant traded handguns for a high-powered assault rifle; defendant stopped defendant's car at a red light on a street, lowered the window, pointed the rifle toward an unarmed group of people on a sidewalk who did not provoke defendant, and fired a shot, paused, and fired a second shot; and defendant fled the scene and disposed of the rifle during a high-speed police pursuit. *State v. Corbin*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 664 (Tenn. Crim. App. Oct. 9, 2020).

11. Owner.

Evidence was sufficient to support defendant's theft conviction, even though the victim died before defendant drove away in the victim's truck, because at the time of his death, the victim had both possession of the truck and a beneficial interest in the truck given that he routinely used it as a means of transportation, and therefore he was the truck's owner. *State v. Helmick*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 104 (Tenn. Crim. App. Mar. 23, 2021).

12. Serious Bodily Injury.

Evidence was sufficient to establish serious bodily injury, and therefore defendant's conviction of especially aggravated kidnapping was affirmed, because the record showed that defendant repeatedly struck the victim resulting in her losing consciousness multiple times, defendant had to support her while walking, she could not shower or walk from the shower to the hotel bed unassisted, her eyes were so swollen from the beating that she could not see the hotel telephone and had to feel around for the cord, and she suffered a laceration on her head that bled, a hematoma to the back of the head, extremely swollen facial features that prevented paramedics from examining the victim's eyes and mouth, a broken nose and eye socket that required surgery, and a neck sprain. *State*

v. Evans, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 623 (Tenn. Crim. App. Sept. 18, 2020).

Evidence was sufficient to convict defendant of aggravated assault and domestic assault because the victim suffered serious bodily injury after being hit and then kicked in the face multiple times by defendant; her left eye was swollen shut, and the left side of her face was heavily bruised; the victim testified that she still experienced facial pain from the assault, and her eye still did not completely open; defendant and the victim had been dating for approximately two years and had been living together; and defendant did not act in self-defense as he was not in danger of death or serious bodily injury at the time he dragged the victim out of the truck and then kicked her in the face multiple times. *State v. Porter*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 654 (Tenn. Crim. App. Oct. 6, 2020).

Evidence was sufficient to find defendant guilty of especially aggravated robbery as a principle offender or under a theory of criminal responsibility because defendant and his accomplices pointed their guns at the victim; the victim gave them his wallet, and one of them took the victim's money from the victim's hand and also demanded the victim's cell phone; the victim punched the individual when he reached for the victim's cell phone, and one of the accomplices ran up to the victim and shot him in the head; and the victim suffered serious bodily injury, and later died from his wound. *State v. Lumpkin*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 809 (Tenn. Crim. App. Dec. 23, 2020).

14. Evidence.

15. —Sufficient.

Evidence was sufficient to support defendant's convictions of aggravated assault and domestic assault because the victim testified that she was defendant's girlfriend and they lived together, defendant held her down and put his hand on her throat, crushing her airway, defendant put all of his weight on her and she could not breathe, defendant only let go when their dog bit him, an officer testified the victim had visible injuries to her face, and the victim identified photographs of the injuries defendant caused. *State v. Green*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 120 (Tenn. Crim. App. Mar. 30, 2021).

17. Reckless.

Evidence was sufficient to convict defendant of misdemeanor reckless endangerment as he showed a complete disregard for the victim's well-being because she testified that she lost consciousness after being assaulted by defendant; he left her lying injured in the middle of the highway in the dark with impaired vision and no shoes or cell phone; there were no street

lights for 2.4 miles; and she walked 3.8 miles barefooted to a restaurant to get help. *State v. Porter*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 654 (Tenn. Crim. App. Oct. 6, 2020).

Evidence was sufficient to support a conviction for the lesser-included offense of reckless homicide because defendant was a perpetrator of the offense under a theory of criminal responsibility; and defendant acted recklessly with

respect to circumstances surrounding the conduct or the result of the conduct as he was aware of but consciously disregarded a substantial and unjustifiable risk that the circumstances existed or the result would occur. *State v. Lumpkin*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 809 (Tenn. Crim. App. Dec. 23, 2020).

39-11-112. Repealed or amended laws — Application in prosecution for offense.

NOTES TO DECISIONS

1. Applicability.

Inasmuch as defendant's sentencing hearing was held after the enactment of the amended theft grading statute, the trial court should have classified defendant's theft convictions in counts 3 and 4 as Class A misdemeanors. The

trial court's failure to apply the amended theft grading statute at sentencing was plain error, requiring that defendant's six-year, Class E felony sentences be vacated. *State v. Moats*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 705 (Tenn. Crim. App. Nov. 2, 2020).

PART 2 BURDEN OF PROOF

39-11-201. Burden of proof.

NOTES TO DECISIONS

ANALYSIS

1. Defenses.
7. Venue.

1. Defenses.

Evidence was sufficient to support defendant's conviction for aggravated assault because the jury clearly chose to credit the victim's version of events, rejecting defendant's testimony supporting self-defense; the victim testified specifically about the manner in which defendant and co-defendant began to follow him, about his attempts to get help through 911, about the shooting, about his fleeing the scene, and about his abandoning his own weapon to seek. *State v. Manning*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 615 (Tenn. Crim. App. Sept. 17, 2020).

39-11-203. Defense.

NOTES TO DECISIONS

3. Self-defense.

Trial court did not err by denying defendant's request for a jury instruction on self-defense because it was not fairly raised by the evidence, as the evidence showed that defendant already

7. Venue.

Minor victim's testimony that the massages of the victim which defendant performed and videotaped occurred in certain apartments where the parties lived and in a hotel room where defendant later lived, along with testimony from the victim's mother, police officers, and defendant, which indicated that the parties lived in the county during the events that transpired, was sufficient for the jury to find that venue for both the aggravated sexual battery and especially aggravated sexual exploitation of a minor offenses was in the county. *Wilson v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 806 (Tenn. Crim. App. Dec. 22, 2020).

had a gun in his hand before the victim exited the market, defendant got out of his vehicle with a gun after blocking the victim's car, and the victim walked out of the market unaware of defendant's presence until defendant ran up

and shot him. *State v. Thompson*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 573 (Tenn. Crim. App. Aug. 20, 2020).

PART 3 CULPABILITY

39-11-302. Definitions of culpable mental state.

NOTES TO DECISIONS

ANALYSIS

1. Intentionally and Knowingly.
6. Evidence Sufficient.

1. Intentionally and Knowingly.

Evidence was sufficient to establish a knowing killing because defendant stabbed the victim twice; the chest wound was five to six inches deep, and it resulted in a fractured rib, a lacerated lung, a lacerated pericardium, and penetrated the heart; the back wound was three to four inches deep; the medical examiners agreed that the chest wound required significant force to inflict; and, although defendant was trained in first aid, he failed to seek immediate medical assistance for the victim, who bled profusely, and lived for possibly 20-30 minutes after she was stabbed. *State v. Robinson*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 553 (Tenn. Crim. App. Aug. 13, 2020).

Evidence was sufficient to support defendant's conviction for selling a Schedule III, controlled substance because defendant picked up a confidential informant (CI) and without being told where to go or for what purpose used defendant's car to transport defendant's girlfriend and the CI to meet with a drug supplier, defendant gave to the supplier the money which the CI gave to defendant and defendant's girlfriend, and defendant and defendant's girlfriend gave the pills which the supplier gave to defendant and defendant's girlfriend to the CI. *State v. Strong*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 66 (Tenn. Crim. App. Feb., 28, 2021).

Evidence was sufficient to support defendant's conviction for second-degree murder because the evidence showed that defendant knowingly killed the victim as defendant and the victim were alone in the kitchen of a house when a gunshot rang out, witnesses ran into the kitchen and saw defendant standing over

the victim with a gun in defendant's hand, and the victim sustained a fatal gunshot wound to the chest. Defendant thereby committed a knowing killing of the victim as defendant pulled out a gun and fired it at the victim. *State v. Olive*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 68 (Tenn. Crim. App. Mar. 3, 2021).

6. Evidence Sufficient.

Evidence was sufficient to show that defendant had physical control over the methamphetamine and an intent to exercise control over it because a false-bottom can containing a substantial amount of methamphetamine was found wedged beneath the passenger seat in his vehicle and he was carrying a large amount of cash on his person. *State v. Austin*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 695 (Tenn. Crim. App. Oct. 27, 2020).

Evidence was sufficient to convict defendant of second degree murder, and not voluntary manslaughter, as defendant committed a knowing killing rather than a killing due to adequate provocation because, after having sex with the victim, defendant followed the victim through the parking lot as he thought the victim had stolen his wallet; the victim confronted defendant with a knife; defendant punched the victim, and the victim dropped the knife; defendant then picked up the knife; he stabbed the victim in the neck, and then 20 more times; and he agreed that his response to the victim's aggression was not reasonable. *State v. Gadsden*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 739 (Tenn. Crim. App. Nov. 19, 2020).

Evidence was sufficient to support defendant's conviction for attempted second degree murder because defendant's statement, "this ain't happening," together with his pointing the gun at the officer and pulling the trigger, showed that defendant acted with the intent to commit a knowing killing. *State v. Moon*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 55 (Tenn. Crim. App. Feb. 14, 2021).

PART 4 CRIMINAL RESPONSIBILITY

39-11-401. Parties to offenses.**NOTES TO DECISIONS****3. Evidence Sufficient.**

Evidence was sufficient to corroborate a co-defendant's testimony as an accomplice, as the victim's testimony established a crime had been committed independent of the codefendant's testimony, the evidence corroborated codefendant's testimony implicating third defendant, and third defendant's testimony admitting she was in the van while traveling and fleeing from the victim's home corroborated codefendant's testimony regarding her presence. *State v. Morales*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 619 (Tenn. Crim. App. Sept. 18, 2020).

Defendant was criminally responsible for facilitation of first-degree, felony murder; attempted especially aggravated robbery; and unlawful possession of a firearm by a convicted felon because defendant and co-defendant trailed the victim in co-defendant's car with the intent to rob the victim, co-defendant approached the victim and attempted to rob the victim before fatally shooting the victim in the head when the victim pulled out a gun, and co-defendant left the victim's purse behind and fled the scene with defendant in co-defendant's car. *State v. Bowen*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 19 (Tenn. Crim. App. Jan. 12, 2021).

Evidence was sufficient to support defendant's conviction for second degree murder under a theory of criminal responsibility because a reasonable juror could find beyond a reasonable doubt that defendant knowingly participated in the knowing killing of the victim and that he was aware that the shooting could result in the victim's death; either defendant or co-defendant threw a bottle at the back of the victim's head, causing the victim to turn around towards them, co-defendant shot the victim in the chest, and both defendant and co-defendant jumped into defendant's car and fled the scene. *State v. Deberry*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 49 (Tenn. Crim. App. Feb. 10, 2021).

Evidence was sufficient to support defendant's conviction for second degree murder under a theory of criminal responsibility because a reasonable juror could find beyond a reasonable doubt that defendant knowingly participated in the knowing killing of the victim and that he was aware that the shooting could result in the victim's death; either defendant or co-defendant threw a bottle at the back of the victim's head, causing the victim to turn around towards them, co-defendant shot the

victim in the chest, and both defendant and co-defendant jumped into defendant's car and fled the scene. *State v. Deberry*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 49 (Tenn. Crim. App. Feb. 10, 2021).

Evidence was sufficient to convict defendant of carjacking and aggravated robbery under a theory of criminal responsibility because defendant was associated with the venture, acted with knowledge that co-defendant was going to hold the victim at gunpoint, engaged in the assault on the victim, and shared in the criminal intent to take the victim's car and property by force. *State v. Harris*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 59 (Tenn. Crim. App. Feb. 23, 2021).

Evidence was sufficient to support defendant's conviction for selling a Schedule III, controlled substance because defendant picked up a confidential informant (CI) and without being told where to go or for what purpose used defendant's car to transport defendant's girlfriend and the CI to meet with a drug supplier, defendant gave to the supplier the money which the CI gave to defendant and defendant's girlfriend, and defendant and defendant's girlfriend gave the pills which the supplier gave to defendant and defendant's girlfriend to the CI. *State v. Strong*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 66 (Tenn. Crim. App. Feb., 28, , 2021).

Evidence was sufficient to support defendant's felony murder convictions on the basis of criminal responsibility for the conduct of another under T.C.A. §§ 39-11-401(a), 39-11-402(2) because it showed that defendant knew his co-defendants intended to enter the victim's home to take drugs and cash, he agreed to drive the co-defendants to the victim's home, and the victim was shot and killed. *State v. Perry*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 105 (Tenn. Crim. App. Mar. 23, 2021).

State presented sufficient evidence that defendant was criminally responsible for the acts committed by his codefendants because defendant's accomplice's testimony that the codefendants carjacked one witness, was sufficiently corroborated by other evidence, including the victims' identification of the codefendants involved in the crimes and defendant's statements, in which he never indicated that he did not share a common purpose with his codefendants, only that he did know that the intended to kill one of the victims. *State v. Williams*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 130 (Tenn. Crim. App. Apr. 6, 2021).

Evidence was sufficient to convict defendant of attempted especially aggravated robbery because, after defendants saw the victim withdraw money from a bank, defendants followed the victim in order to rob her; when the victim pulled into a driveway, co-defendant exited his vehicle armed with a gun, approached the victim, and attempted to rob her; the victim re-

sisted, and co-defendant shot her in the head; and defendant associated himself with and aided in committing the planned robbery and acted to promote or assist in the commission of the robbery from which he intended to benefit. *State v. Bowen*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 149 (Tenn. Crim. App. Apr. 13, 2021).

39-11-402. Criminal responsibility for conduct of another.

NOTES TO DECISIONS

ANALYSIS

- 16. Evidence.
- 17. —Sufficient.
- 18. —Insufficient.

16. Evidence.

17. —Sufficient.

Evidence was sufficient to find defendant guilty of especially aggravated robbery as a principle offender or under a theory of criminal responsibility because defendant and his accomplices pointed their guns at the victim; the victim gave them his wallet, and one of them took the victim's money from the victim's hand and also demanded the victim's cell phone; the victim punched the individual when he reached for the victim's cell phone, and one of the accomplices ran up to the victim and shot him in the head; and the victim suffered serious bodily injury, and later died from his wound. *State v. Lumpkin*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 809 (Tenn. Crim. App. Dec. 23, 2020).

Defendant was criminally responsible for facilitation of first-degree, felony murder; attempted especially aggravated robbery; and unlawful possession of a firearm by a convicted felon because defendant and co-defendant trailed the victim in co-defendant's car with the intent to rob the victim, co-defendant approached the victim and attempted to rob the victim before fatally shooting the victim in the head when the victim pulled out a gun, and co-defendant left the victim's purse behind and fled the scene with defendant in co-defendant's car. *State v. Bowen*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 19 (Tenn. Crim. App. Jan. 12, 2021).

Evidence was sufficient to support defendant's conviction for second degree murder under a theory of criminal responsibility because a reasonable juror could find beyond a reasonable doubt that defendant knowingly participated in the knowing killing of the victim and that he was aware that the shooting could result in the victim's death; either defendant or co-defendant threw a bottle at the back of the

victim's head, causing the victim to turn around towards them, co-defendant shot the victim in the chest, and both defendant and co-defendant jumped into defendant's car and fled the scene. *State v. Deberry*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 49 (Tenn. Crim. App. Feb. 10, 2021).

Evidence was sufficient to support defendant's conviction for criminal responsibility, as the evidence supported a determination that defendant knowingly and voluntarily shared in the criminal intent of the crimes and promoted their commission when he drove co-defendant and the victim to the location where the robbery was to take place. *State v. Ellis*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 52 (Tenn. Crim. App. Feb. 11, 2021).

Evidence was sufficient to convict defendant of carjacking and aggravated robbery under a theory of criminal responsibility because defendant was associated with the venture, acted with knowledge that co-defendant was going to hold the victim at gunpoint, engaged in the assault on the victim, and shared in the criminal intent to take the victim's car and property by force. *State v. Harris*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 59 (Tenn. Crim. App. Feb. 23, 2021).

Evidence was sufficient to support defendant's felony murder convictions on the basis of criminal responsibility for the conduct of another under T.C.A. §§ 39-11-401(a), 39-11-402(2) because it showed that defendant knew his co-defendants intended to enter the victim's home to take drugs and cash, he agreed to drive the co-defendants to the victim's home, and the victim was shot and killed. *State v. Perry*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 105 (Tenn. Crim. App. Mar. 23, 2021).

Evidence was sufficient to convict defendant of facilitation of first-degree, felony murder because defendants attempted to rob the victim after seeing her withdraw cash at the bank; defendant knew co-defendant intended to rob the victim when co-defendant approached her in the driveway armed with a gun; defendant furnished substantial assistance in the commission of the attempted robbery by identifying the victim as a target, following the victim in order to rob her, and fleeing the scene after

attempting to rob her; and the victim died from a gunshot wound to the head. *State v. Bowen*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 149 (Tenn. Crim. App. Apr. 13, 2021).

Evidence was sufficient to convict defendant of attempted especially aggravated robbery because, after defendants saw the victim withdraw money from a bank, defendants followed the victim in order to rob her; when the victim pulled into a driveway, co-defendant exited his vehicle armed with a gun, approached the victim, and attempted to rob her; the victim resisted, and co-defendant shot her in the head; and defendant associated himself with and aided in committing the planned robbery and acted to promote or assist in the commission of the robbery from which he intended to benefit. *State v. Bowen*, — S.W.3d —, 2021 Tenn. Crim.

App. LEXIS 149 (Tenn. Crim. App. Apr. 13, 2021).

18. —Insufficient.

State presented sufficient evidence that defendant was criminally responsible for the acts committed by his codefendants because defendant's accomplice's testimony that the codefendants carjacked one witness, was sufficiently corroborated by other evidence, including the victims' identification of the codefendants involved in the crimes and defendant's statements, in which he never indicated that he did not share a common purpose with his codefendants, only that he did know that the intended to kill one of the victims. *State v. Williams*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 130 (Tenn. Crim. App. Apr. 6, 2021).

39-11-403. Criminal responsibility for facilitation of felony.

NOTES TO DECISIONS

ANALYSIS

7. Sentencing.
8. Evidence.
9. —Sufficient.

7. Sentencing.

Trial court did not err in sentencing defendant to 40 years for the facilitation of first-degree, felony murder conviction and 20 years for the attempted especially aggravated robbery conviction because the trial court properly considered defendant's criminal history and the statutory criteria in finding defendant to be a Range II, multiple offender; the trial court reviewed the presentence report, the nature and characteristics of the criminal conduct involved, the applicable enhancement and mitigating factors, and defendant's potential for rehabilitation; and the presentence report listed defendant's criminal history which began in 1995 at the age of 16 and included numerous misdemeanor and felony convictions. *State v. Bowen*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 149 (Tenn. Crim. App. Apr. 13, 2021).

8. Evidence.

9. —Sufficient.

Evidence supported defendant's conviction for facilitation of first-degree, felony murder

because defendant and co-defendant trailed the victim in co-defendant's car with the intent to rob the victim, co-defendant stopped and approached the victim with a gun when the victim parked the victim's car and attempted to rob the victim, defendant fatally shot the victim in the head when the victim pulled out a gun, and co-defendant left the victim's purse behind and fled the scene with defendant in co-defendant's car. *State v. Bowen*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 19 (Tenn. Crim. App. Jan. 12, 2021).

Evidence was sufficient to convict defendant of facilitation of first-degree, felony murder because defendants attempted to rob the victim after seeing her withdraw cash at the bank; defendant knew co-defendant intended to rob the victim when co-defendant approached her in the driveway armed with a gun; defendant furnished substantial assistance in the commission of the attempted robbery by identifying the victim as a target, following the victim in order to rob her, and fleeing the scene after attempting to rob her; and the victim died from a gunshot wound to the head. *State v. Bowen*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 149 (Tenn. Crim. App. Apr. 13, 2021).

PART 5 GENERAL DEFENSES

39-11-503. Intoxication.

NOTES TO DECISIONS

ANALYSIS

1. Mental State.
2. Rejection of Defense.

1. Mental State.

Defendant failed to show that trial counsel was deficient in failing to present evidence that defendant was too intoxicated to form the requisite intent for first degree premeditated murder. Regardless, defendant was able to recall at trial the precise route taken to the victim's residence, defendant was able to recall what occurred on the victim's front porch prior to the shooting, and defendant made several declarations of intent to kill the victim in the hours leading up to the victim's death. *Hudgins v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 803 (Tenn. Crim. App. Dec. 22, 2020).

2. Rejection of Defense.

Evidence was sufficient to support defendant's convictions for attempted first-degree murder because defendant by his own admissions stated that he was not drunk when he fired the shots at the officers and bystanders, defendant declared an intent to kill his girlfriend when he pointed a handgun at her head inside their bedroom, he used two different rifles to shoot at the victims at least 52 times, he emptied the clips from both rifles, he made impact with all three police vehicles and he hit his girlfriend and a deputy, and he left and went to hide in a nearby cave when a sergeant returned fire. *State v. Pitts*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 71 (Tenn. Crim. App. Mar. 4, 2021).

PART 6 JUSTIFICATION EXCLUDING CRIMINAL RESPONSIBILITY

39-11-601. Justification a defense.

NOTES TO DECISIONS

2. Self-Defense.

Evidence was sufficient to support defendant's conviction for aggravated assault because the jury clearly chose to credit the victim's version of events, rejecting defendant's testimony supporting self-defense; the victim testified specifically about the manner in which

defendant and co-defendant began to follow him, about his attempts to get help through 911, about the shooting, about his fleeing the scene, and about his abandoning his own weapon to seek. *State v. Manning*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 615 (Tenn. Crim. App. Sept. 17, 2020).

39-11-611. Self-defense. [Effective until July 1, 2021. See the version effective on July 1, 2021.]

NOTES TO DECISIONS

ANALYSIS

6. Evidence.
8. Defense Rejected.
9. Instructions.
13. No Self-defense.

6. Evidence.

Evidence was sufficient to support defendant's conviction for aggravated assault because the jury clearly chose to credit the victim's version of events, rejecting defendant's testimony supporting self-defense; the victim testified specifically about the manner in which

defendant and co-defendant began to follow him, about his attempts to get help through 911, about the shooting, about his fleeing the scene, and about his abandoning his own weapon to seek. *State v. Manning*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 615 (Tenn. Crim. App. Sept. 17, 2020).

8. Defense Rejected.

Trial court had sufficient evidence upon which to reject the Defendant's claim of self-defense because nothing in the video or the officer's testimony suggested that they used excessive force when they placed the handcuffs

on defendant, and the officers' merely advising him that he was being detained and attempted to handcuff him, which did not amount to greater force than necessary to make an arrest. *State v. Forkpa*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 724 (Tenn. Crim. App. Nov. 16, 2020).

9. Instructions.

Trial court did not err by denying defendant's request for a jury instruction on self-defense because it was not fairly raised by the evidence, as the evidence showed that defendant already had a gun in his hand before the victim exited the market, defendant got out of his vehicle with a gun after blocking the victim's car, and the victim walked out of the market unaware of defendant's presence until defendant ran up and shot him. *State v. Thompson*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 573 (Tenn. Crim. App. Aug. 20, 2020).

Trial court did not err by not instructing the jury on self-defense because the evidence did not fairly raise the issue, as defendant denied

the victim's claims of physical contact. *State v. Green*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 120 (Tenn. Crim. App. Mar. 30, 2021).

13. No Self-defense.

Evidence was sufficient to convict defendant of aggravated assault and domestic assault because the victim suffered serious bodily injury after being hit and then kicked in the face multiple times by defendant; her left eye was swollen shut, and the left side of her face was heavily bruised; the victim testified that she still experienced facial pain from the assault, and her eye still did not completely open; defendant and the victim had been dating for approximately two years and had been living together; and defendant did not act in self-defense as he was not in danger of death or serious bodily injury at the time he dragged the victim out of the truck and then kicked her in the face multiple times. *State v. Porter*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 654 (Tenn. Crim. App. Oct. 6, 2020).

39-11-611. Self-defense. [Effective on July 1, 2021. See the version effective until July 1, 2021.]

NOTES TO DECISIONS

ANALYSIS

- 6. Evidence.
- 8. Defense Rejected.
- 9. Instructions.
- 13. No Self-defense.

6. Evidence.

Evidence was sufficient to support defendant's conviction for aggravated assault because the jury clearly chose to credit the victim's version of events, rejecting defendant's testimony supporting self-defense; the victim testified specifically about the manner in which defendant and co-defendant began to follow him, about his attempts to get help through 911, about the shooting, about his fleeing the scene, and about his abandoning his own weapon to seek. *State v. Manning*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 615 (Tenn. Crim. App. Sept. 17, 2020).

8. Defense Rejected.

Trial court had sufficient evidence upon which to reject the Defendant's claim of self-defense because nothing in the video or the officer's testimony suggested that they used excessive force when they placed the handcuffs on defendant, and the officers' merely advising him that he was being detained and attempted to handcuff him, which did not amount to greater force than necessary to make an arrest.

State v. Forkpa, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 724 (Tenn. Crim. App. Nov. 16, 2020).

9. Instructions.

Trial court did not err by denying defendant's request for a jury instruction on self-defense because it was not fairly raised by the evidence, as the evidence showed that defendant already had a gun in his hand before the victim exited the market, defendant got out of his vehicle with a gun after blocking the victim's car, and the victim walked out of the market unaware of defendant's presence until defendant ran up and shot him. *State v. Thompson*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 573 (Tenn. Crim. App. Aug. 20, 2020).

Trial court did not err by not instructing the jury on self-defense because the evidence did not fairly raise the issue, as defendant denied the victim's claims of physical contact. *State v. Green*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 120 (Tenn. Crim. App. Mar. 30, 2021).

13. No Self-defense.

Evidence was sufficient to convict defendant of aggravated assault and domestic assault because the victim suffered serious bodily injury after being hit and then kicked in the face multiple times by defendant; her left eye was swollen shut, and the left side of her face was heavily bruised; the victim testified that she still experienced facial pain from the assault,

and her eye still did not completely open; defendant and the victim had been dating for approximately two years and had been living together; and defendant did not act in self-defense as he was not in danger of death or

serious bodily injury at the time he dragged the victim out of the truck and then kicked her in the face multiple times. *State v. Porter*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 654 (Tenn. Crim. App. Oct. 6, 2020).

CHAPTER 12

GENERAL OFFENSES

PART 1 INCHOATE OFFENSES

39-12-101. Criminal attempt.

NOTES TO DECISIONS

ANALYSIS

1. Application.
3. —Attempted Murder.
5. —Attempted Robbery.
7. —Attempted Rape of a Child.
15. Sufficiency of Evidence.

1. Application.

3. —Attempted Murder.

Evidence supported defendant's convictions for first degree premeditated murder and attempted first degree premeditated murder because defendant traded handguns for a high-powered assault rifle; defendant stopped defendant's car at a red light on a street, lowered the window, pointed the rifle toward an unarmed group of people on a sidewalk who did not provoke defendant, and fired a shot, paused, and fired a second shot; and defendant fled the scene and disposed of the rifle during a high-speed police pursuit. *State v. Corbin*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 664 (Tenn. Crim. App. Oct. 9, 2020).

Defendant's indictment for attempted first-degree murder was sufficient to permit him to be tried on that charge because the indictment necessarily implied the attempted homicide was intentional as the element of premeditation required a previously formed design or intent to kill; the indictment clearly stated that the alleged offense occurred with premeditation and was a Class A felony; and the only attempted homicide offense that had an element of premeditation and was a Class A felony was attempted first-degree murder. *State v. Robinson*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 96 (Tenn. Crim. App. Mar. 17, 2021).

Evidence supported defendant's first-degree premeditated murder and attempted first-degree murder convictions because jailhouse phone calls were entered into evidence in which defendant admitted to shooting at the murder victim, who had stabbed defendant years ear-

lier, and the attempted murder victim when the victims were standing beside each other; defendant said that defendant did not regret what defendant had done; and defendant explained as the reason for defendant's actions that defendant was the most vindictive person in the world. *State v. Smith*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 148 (Tenn. Crim. App. Apr. 13, 2021).

4. —Attempted Robbery.

Evidence supported defendant's conviction for attempted especially aggravated robbery because defendant and co-defendant trailed the victim in co-defendant's car with the intent to rob the victim, co-defendant stopped and approached the victim with a gun when the victim parked the victim's car and attempted to rob the victim, defendant fatally shot the victim in the head when the victim pulled out a gun, and co-defendant left the victim's purse behind and fled the scene with defendant in co-defendant's car. *State v. Bowen*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 19 (Tenn. Crim. App. Jan. 12, 2021).

6. —Attempted Rape of a Child.

Evidence was sufficient to convict defendant of attempted rape of a child because defendant sent text messages to the nine-year-old victim asking when she wanted to have sex with him; a detective began posing as the victim; defendant messaged the victim to meet him at a specific location; when defendant arrived at the meeting location and was arrested, he had a tube of petroleum jelly, a condom, and an inflatable mattress in his car; and the State was only required to prove that defendant believed he was going to have sex with a child under the age of 13. *State v. Holbrooks*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 674 (Tenn. Crim. App. Oct. 14, 2020).

Evidence that defendant, while naked, got on top of the victim and attempted to place defendant's erect penis inside the victim's mouth.

that the victim turned his head, declined, and told defendant he did not want to do this was sufficient to support defendant's attempted rape of a child conviction. *State v. King*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 56 (Tenn. Crim. App. Feb. 22, 2021).

15. Sufficiency of Evidence.

Evidence that the surviving victim saw defendant with a gun, saw the deceased victim grab his chest, and defendant shot the surviving victim in the face and knee was sufficient to support defendant's convictions for second degree murder and attempted second degree murder. *State v. Jones*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 575 (Tenn. Crim. App. Aug. 25, 2020).

Evidence was sufficient to support defendant's conviction of attempted second degree murder because the video from the store's security cameras showed that defendant looked in the store employee's direction prior to approaching the service counter and demanding money from the victim, and after shooting the victim, defendant turned and fired his gun once in the direction of the fleeing employee. *State v. Miller*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 624 (Tenn. Crim. App. Sept. 18, 2020).

Evidence was sufficient for a rational trier of fact to find beyond a reasonable doubt that defendant knowingly attempted to kill a deputy where it showed that the deputy spotted the defendant speeding and attempted to effectuate a traffic stop, defendant failed to stop and led the deputy on a chase for approximately 20 minutes, and when defendant stopped his car, he exited his vehicle while holding a gun in his left hand and fired at least one shot in the direction of the deputy, who was outside of his vehicle at that point. *State v. Ochoa-Puentes*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 643 (Tenn. Crim. App. Sept. 29, 2020).

Evidence was sufficient to convict defendant of first degree felony murder, criminal attempt to commit second degree murder, aggravated robbery, and employing a firearm during the commission of a felony because defendant and co-defendant, each wielding a deadly weapon, approached the victims on the front porch of a residence; an altercation between the four men ensued; defendant pointed an automatic pistol at the first victim; while brandishing his weapon, co-defendant took cash from each victim and a cell phone from the second victim; when the second victim attempted to defend himself, co-defendant fired five shots; and the second victim later died from his gunshot wounds. *State v. Wilson*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 719 (Tenn. Crim. App. Nov. 10, 2020).

Where a doctor testified that the stick which was surgically removed from the victim's throat was potentially life-threatening, the jury could have reasonably the evidence was sufficient to

sustain defendant's conviction of attempted second degree murder. *State v. Boyd*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 745 (Tenn. Crim. App. Nov. 19, 2020).

Evidence was sufficient to support defendant's convictions of second degree murder, attempted second degree murder, and employing a firearm during the commission of a dangerous felony because it showed that defendant had previously shot the victim, they got into an argument at a store, when the victim and his friend left the store on a scooter defendant and his friends began shooting them, the victim's friend identified defendant as one of the men who shot at them, and the victim's cause of death was two gunshot wounds to the chest. *State v. Stevenson*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 798 (Tenn. Crim. App. Dec. 16, 2020).

Evidence was sufficient to support defendant's convictions of attempted theft of property valued at \$10,000 or more but less than \$60,000 and criminal simulation because it showed that he took a check for \$13,187 to the bank and, after learning that he could not cash the check, attempted to open a bank account using the funds from the check, both the payee and the amount had been altered, and after two weeks he returned to the bank with the ATM card that had been issued to him for the purpose of accessing the funds from the check. *State v. Anderson*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 15 (Tenn. Crim. App. Jan. 12, 2021).

Evidence was sufficient to support defendant's conviction for attempted second degree murder because defendant's statement, "this ain't happening," together with his pointing the gun at the officer and pulling the trigger, showed that defendant acted with the intent to commit a knowing killing. *State v. Moon*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 55 (Tenn. Crim. App. Feb. 14, 2021).

Evidence was sufficient to support defendant's convictions for attempted first-degree murder because defendant by his own admissions stated that he was not drunk when he fired the shots at the officers and bystanders, defendant declared an intent to kill his girlfriend when he pointed a handgun at her head inside their bedroom, he used two different rifles to shoot at the victims at least 52 times, he emptied the clips from both rifles, he made impact with all three police vehicles and he hit his girlfriend and a deputy, and he left and went to hide in a nearby cave when a sergeant returned fire. *State v. Pitts*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 71 (Tenn. Crim. App. Mar. 4, 2021).

Evidence supported defendant's conviction for attempted voluntary manslaughter, given that he and the victim engaged in a physical altercation prior to the shooting, defendant threatened that he had a gun, then retrieved a

gun from his home, aimed the gun at the victim, and fired at least one shot at him. The trial court could reasonably find that defendant knowingly shot at the victim with the intent to kill him. *State v. Burgess*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 88 (Tenn. Crim. App. Mar. 12, 2021).

Evidence that defendant fled in his car at high speeds from the police officer victim, fired two shots from a pump-action shotgun striking the victim's patrol car, continued to flee, fired a shotgun blast striking the victim in the arm and then fired four more shots before fleeing the scene was sufficient to support defendant's conviction for attempted first degree murder under T.C.A. § 39-13-202. *State v. Wilson*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 122 (Tenn. Crim. App. Mar. 31, 2021).

Evidence was sufficient to convict defendant of attempted especially aggravated robbery because, after defendants saw the victim withdraw money from a bank, defendants followed the victim in order to rob her; when the victim pulled into a driveway, co-defendant exited his vehicle armed with a gun, approached the victim, and attempted to rob her; the victim resisted, and co-defendant shot her in the head; and defendant associated himself with and aided in committing the planned robbery and acted to promote or assist in the commission of the robbery from which he intended to benefit. *State v. Bowen*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 149 (Tenn. Crim. App. Apr. 13, 2021).

39-12-103. Criminal conspiracy.

NOTES TO DECISIONS

ANALYSIS

5. Evidence.
6. —Sufficient.

5. Evidence.

6. —Sufficient.

Evidence was sufficient to support second and third defendants' convictions for aggravated robbery, theft, conspiracy, aggravated burglary, and firearms offenses, as it showed that first defendant devised a plan to conduct a home invasion and steal stuff, he enlisted others, including second and third defendants, to carry out the plan, and the group carried out the plan, which included the use of masks, gloves, and a gun to take the items from the

victim's home. *State v. Morales*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 619 (Tenn. Crim. App. Sept. 18, 2020).

Evidence was sufficient to support defendant's conviction of conspiracy to sell or deliver a controlled substance because it showed that a confidential informant (CI) purchased oxycodone and heroin from defendant on two occasions, defendant was seen on two separate occasions getting into the CI's car and going to another man's house to purchase heroin for the CI, the drugs provided by the CI were tested and determined to be oxycodone and heroin, and the testimony at trial revealed that on two separate occasions defendant purchased heroin from another man to sell to the CI. *State v. Woods*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 667 (Tenn. Crim. App. Oct. 12, 2020).

39-12-107. Grading attempt, solicitation and conspiracy.

NOTES TO DECISIONS

2. Sentence.

Attempted aggravated sexual battery is a Class C felony and attempted sexual battery is a Class A misdemeanor. *McKaughan v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 21 (Tenn. Crim. App. Jan. 13, 2021).

Trial court did not err in sentencing defendant to 40 years for the facilitation of first-degree, felony murder conviction and 20 years for the attempted especially aggravated robbery conviction because the trial court properly considered defendant's criminal history and the

statutory criteria in finding defendant to be a Range II, multiple offender; the trial court reviewed the presentence report, the nature and characteristics of the criminal conduct involved, the applicable enhancement and mitigating factors, and defendant's potential for rehabilitation; and the presentence report listed defendant's criminal history which began in 1995 at the age of 16 and included numerous misdemeanor and felony convictions. *State v. Bowen*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 149 (Tenn. Crim. App. Apr. 13, 2021).

CHAPTER 13

OFFENSES AGAINST PERSON

PART 1 ASSAULTIVE OFFENSES

39-13-101. Assault.

NOTES TO DECISIONS

11. Sufficiency of Evidence.

Evidence was sufficient to support defendant's conviction for aggravated assault because the jury clearly chose to credit the victim's version of events, rejecting defendant's testimony supporting self-defense; the victim testified specifically about the manner in which defendant and co-defendant began to follow him, about his attempts to get help through 911, about the shooting, about his fleeing the scene, and about his abandoning his own weapon to seek. *State v. Manning*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 615 (Tenn. Crim. App. Sept. 17, 2020).

Evidence was sufficient to support defendant's conviction for aggravated assault resulting in death, where an expert, after being apprised of the victim's pre-existing medical conditions as well as what occurred with the paramedics during transport, testified that the blunt force trauma was the cause of the victim's death. *State v. Armstrong*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 672 (Tenn. Crim. App. Oct. 13, 2020).

Evidence failed to show that the victim suffered any injury as a result of defendant's

conduct and thus the evidence was insufficient to support a conviction of child abuse or child neglect; the victim did not testify to experiencing any pain and the State presented no evidence of any emotional or psychological harm to the victim or of defendant's failure to act or deprivation of care for the victim. The evidence that defendant touched the victim's penis underneath his clothes satisfied the elements of a simple assault by offensive touching. *State v. Walkington*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 734 (Tenn. Crim. App. Nov. 19, 2020).

Evidence was sufficient to support defendant's convictions of aggravated assault and domestic assault because the victim testified that she was defendant's girlfriend and they lived together; defendant held her down and put his hand on her throat, crushing her airway; defendant put all of his weight on her and she could not breathe; defendant only let go when their dog bit him; an officer testified the victim had visible injuries to her face, and the victim identified photographs of the injuries defendant caused. *State v. Green*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 120 (Tenn. Crim. App. Mar. 30, 2021).

39-13-102. Aggravated assault.

NOTES TO DECISIONS

ANALYSIS

11. Lesser Included Offense.
14. Evidence.
15. —Sufficient.
18. Sentencing.

11. Lesser Included Offense.

Aggravated assault that results in serious bodily injury to another is not a lesser offense of aggravated assault that results in death; however, the various subsections do carry different release eligibility upon conviction. *State v. Burgess*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 88 (Tenn. Crim. App. Mar. 12, 2021).

14. Evidence.

15. —Sufficient.

Evidence was sufficient to support defendant's conviction for aggravated assault because the jury clearly chose to credit the victim's version of events, rejecting defendant's testimony supporting self-defense; the victim testified specifically about the manner in which defendant and co-defendant began to follow him, about his attempts to get help through 911, about the shooting, about his fleeing the scene, and about his abandoning his own weapon to seek. *State v. Manning*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 615 (Tenn. Crim. App. Sept. 17, 2020).

Evidence was sufficient to support defendant's convictions of three counts of aggravated assault and one count of aggravated kidnapping because it showed that during an argument defendant forced the victim into a chair, he blocked the victim from leaving the residence and grabbed her by the neck, and when the victim tried to leave again defendant brandished a knife and told her she would only leave in a body bag. *State v. Stevens*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 626 (Tenn. Crim. App. Sept. 21, 2020).

Evidence was sufficient to convict defendant of aggravated assault and domestic assault because the victim suffered serious bodily injury after being hit and then kicked in the face multiple times by defendant; her left eye was swollen shut, and the left side of her face was heavily bruised; the victim testified that she still experienced facial pain from the assault, and her eye still did not completely open; defendant and the victim had been dating for approximately two years and had been living together; and defendant did not act in self-defense as he was not in danger of death or serious bodily injury at the time he dragged the victim out of the truck and then kicked her in the face multiple times. *State v. Porter*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 654 (Tenn. Crim. App. Oct. 6, 2020).

Evidence was sufficient to sustain defendant's convictions for especially aggravated robbery and aggravated assault, as the record indicated defendant hit the victim in the back of the head three times with a hatchet and stole \$13.00 and a bus pass from the victim's pocket and the victim testified that as a result of the attack he lost consciousness, suffered a skull fracture, received nearly thirty stitches, remained scarred and disfigured, and continued to experience pain and dizziness. *State v. Goff*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 768 (Tenn. Crim. App. Nov. 30, 2020).

Evidence was sufficient to support defendant's convictions of aggravated assault and domestic assault because the victim testified that she was defendant's girlfriend and they lived together, defendant held her down and put his hand on her throat, crushing her airway, defendant put all of his weight on her and she could not breathe, defendant only let go when their dog bit him, an officer testified the victim had visible injuries to her face, and the victim identified photographs of the injuries defendant caused. *State v. Green*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 120 (Tenn. Crim. App. Mar. 30, 2021).

18. Sentencing.

Trial court properly sentenced defendant to a within range sentence of eight years and six months for aggravated assault and 11 months, 29 days for both reckless endangerment and domestic assault because, as a Range II offender multiple offender, defendant was subject to a sentencing range of six to 10 years for aggravated assault, and 11 months, 29 days for the Class A misdemeanors of reckless endangerment and domestic assault; defendant had a history of criminal convictions in addition to those necessary to establish the range; and he was on release from a federal sentence when he committed the offenses. *State v. Porter*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 654 (Tenn. Crim. App. Oct. 6, 2020).

Trial court did not err in ordering that defendant's entire sentence for aggravated assault be served in confinement and in denying full probation because the trial court needed to avoid depreciating the seriousness of the offense; the sentence of incarceration for the entire sentence and the denial of probation was compliant with the purposes and principles of sentencing; defendant violated probation twice in 2018, within a span of four months, and also committed a new offense which resulted in a conviction; and defendant lacked the potential for rehabilitation. *State v. Kirby*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 759 (Tenn. Crim. App. Nov. 30, 2020).

As to defendant's conviction of aggravated assault, both the State and the trial court misstated the law; under T.C.A. § 40-35-501(k)(7), a person convicted of aggravated assault that results in death (not that involves the use of a deadly weapon) must serve 75 percent (not 70 percent) of the sentence imposed by the trial court. As the judgment did not reflect the verdict announced or the sentence imposed by the trial court, remand was required. *State v. Burgess*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 88 (Tenn. Crim. App. Mar. 12, 2021).

In a case in which defendant was convicted of 11 counts of aggravated assault, the record supported the trial court's application of enhancement factors three and ten as there were multiple victims present at the scene other than those named in the charging instruments because the presentence report showed that a deputy was present while defendant fired shots and that unnamed S.W.A.T. officers responded to the ongoing incident. *State v. Ledford*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 157 (Tenn. Crim. App. Apr. 19, 2021).

39-13-103. Reckless endangerment.**NOTES TO DECISIONS****ANALYSIS**

7. Zone of Danger.
9. Sufficiency of Evidence.
10. Sentencing.

7. Zone of Danger.

Because the record was devoid of evidence that anyone was in the vicinity when defendant allegedly discharged his gun, he could not have violated T.C.A. § 39-13-103. *United States v. Mukes*, 980 F.3d 526, 2020 FED App. 360P, 2020 FED App. 0360P (6th Cir.), 2020 U.S. App. LEXIS 36085 (6th Cir. Nov. 17, 2020).

9. Sufficiency of Evidence.

Evidence was sufficient to convict defendant of misdemeanor reckless endangerment as he showed a complete disregard for the victim's well-being because she testified that she lost consciousness after being assaulted by defendant; he left her lying injured in the middle of the highway in the dark with impaired vision

and no shoes or cell phone; there were no street lights for 2.4 miles; and she walked 3.8 miles barefooted to a restaurant to get help. *State v. Porter*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 654 (Tenn. Crim. App. Oct. 6, 2020).

10. Sentencing.

Trial court properly sentenced defendant to a within range sentence of eight years and six months for aggravated assault and 11 months, 29 days for both reckless endangerment and domestic assault because, as a Range II offender multiple offender, defendant was subject to a sentencing range of six to 10 years for aggravated assault, and 11 months, 29 days for the Class A misdemeanors of reckless endangerment and domestic assault; defendant had a history of criminal convictions in addition to those necessary to establish the range; and he was on release from a federal sentence when he committed the offenses. *State v. Porter*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 654 (Tenn. Crim. App. Oct. 6, 2020).

39-13-111. Domestic assault.**NOTES TO DECISIONS****ANALYSIS**

2. Sufficiency of Evidence.
4. Sentencing.

2. Sufficiency of Evidence.

Evidence was sufficient to convict defendant of aggravated assault and domestic assault because the victim suffered serious bodily injury after being hit and then kicked in the face multiple times by defendant; her left eye was swollen shut, and the left side of her face was heavily bruised; the victim testified that she still experienced facial pain from the assault, and her eye still did not completely open; defendant and the victim had been dating for approximately two years and had been living together; and defendant did not act in self-defense as he was not in danger of death or serious bodily injury at the time he dragged the victim out of the truck and then kicked her in the face multiple times. *State v. Porter*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 654 (Tenn. Crim. App. Oct. 6, 2020).

Evidence was sufficient to support defendant's convictions of aggravated assault and domestic assault because the victim testified that she was defendant's girlfriend and they

lived together, defendant held her down and put his hand on her throat, crushing her airway, defendant put all of his weight on her and she could not breathe, defendant only let go when their dog bit him, an officer testified the victim had visible injuries to her face, and the victim identified photographs of the injuries defendant caused. *State v. Green*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 120 (Tenn. Crim. App. Mar. 30, 2021).

4. Sentencing.

Trial court properly sentenced defendant to a within range sentence of eight years and six months for aggravated assault and 11 months, 29 days for both reckless endangerment and domestic assault because, as a Range II offender multiple offender, defendant was subject to a sentencing range of six to 10 years for aggravated assault, and 11 months, 29 days for the Class A misdemeanors of reckless endangerment and domestic assault; defendant had a history of criminal convictions in addition to those necessary to establish the range; and he was on release from a federal sentence when he committed the offenses. *State v. Porter*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 654 (Tenn. Crim. App. Oct. 6, 2020).

PART 2 CRIMINAL HOMICIDE

39-13-201. Criminal homicide.

NOTES TO DECISIONS

6. Sufficiency of Indictment.

Defendant's indictment for attempted first-degree murder was sufficient to permit him to be tried on that charge because the indictment necessarily implied the attempted homicide was intentional as the element of premeditation required a previously formed design or intent to kill; the indictment clearly stated that

the alleged offense occurred with premeditation and was a Class A felony; and the only attempted homicide offense that had an element of premeditation and was a Class A felony was attempted first-degree murder. *State v. Robinson*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 96 (Tenn. Crim. App. Mar. 17, 2021).

39-13-202. First degree murder.

NOTES TO DECISIONS

ANALYSIS

4. Elements.
6. —Premeditation.
7. Sufficiency of Indictment.
10. Felony Murder.
20. Evidence Sufficient.
21. —Identity.
22. —Attempted First Degree Murder.
23. —Premeditation.
26. Sentencing.

4. Elements.**6. —Premeditation.**

Criminal court properly sentenced defendant to life imprisonment after the jury convicted him of first-degree premeditated murder for a shooting he committed at his former workplace because the jury could have reasonably inferred from the facts that defendant killed the victim (a co-worker) in an unprovoked act of violence as a response to his termination from his employment for leaving the victim alone in a dangerous job that required both employees. *State v. York*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 121 (Tenn. Crim. App. Mar. 30, 2021).

7. Sufficiency of Indictment.

Defendant's indictment for attempted first-degree murder was sufficient to permit him to be tried on that charge because the indictment necessarily implied the attempted homicide was intentional as the element of premeditation required a previously formed design or intent to kill; the indictment clearly stated that the alleged offense occurred with premeditation and was a Class A felony; and the only attempted homicide offense that had an element of premeditation and was a Class A felony was attempted first-degree murder. *State v. Robin-*

son, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 96 (Tenn. Crim. App. Mar. 17, 2021).

10. Felony Murder.

Evidence was sufficient to support defendant's conviction of felony murder because it showed he entered the market wearing a mask and carrying a gun, he approached the victim with his gun drawn and threatened the victim, when the victim did not comply with his demands defendant fired at the victim's head twice fatally wounding him, and he jumped over the counter and attempted to open the cash register. *State v. Miller*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 624 (Tenn. Crim. App. Sept. 18, 2020).

20. Evidence Sufficient.

Evidence was sufficient to convict defendant of felony murder as he killed the victim in the perpetration of attempted robbery because co-defendant called defendant and told him that the victim had more marijuana and cash than expected; co-defendant left it up to defendant to let co-defendant make a purchase or to take everything; a surveillance video showed defendant creeping up behind the passenger side of the victim's vehicle; defendant put his gun inside the victim's car; defendant admitted to shooting the victim, and even having to clear a jam in the gun at one point; and, although defendant testified at trial that he did not intend to rob the victim, his written statement and actions during the crime strongly indicated otherwise. *State v. Miller*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 514 (Tenn. Crim. App. July 27, 2020).

Defendant was properly convicted of first-degree murder, tampering with evidence, and setting fire to personal property because the evidence established, *inter alia*, that defendant, the accomplice, and the victim got into a car

and drove to a parking lot where, after the victim and defendant exited the car, the accomplice heard a thud on the car, defendant instructed the accomplice to open the trunk, the accomplice then saw defendant take the victim out of the trunk at another location, and after instructing the accomplice to purchase some gasoline and retrieve a rag and spray bottle with bleach, defendant wiped the car down, poured gasoline in it, and set it on fire. *State v. Shuler*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 608 (Tenn. Crim. App. Sept. 15, 2020).

Evidence was sufficient to support defendant's conviction for first degree premeditated murder because it established that defendant and the victim argued at a party, defendant threatened to shoot the victim in the face, and defendant pulled out a concealed revolver and shot the unarmed victim in the forehead. *State v. Sales*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 621 (Tenn. Crim. App. Sept. 17, 2020).

Evidence supported defendant's first-degree felony murder and robbery convictions because the forensic pathologist testified that the victim's cause of death was suffocation, blunt force injuries, and possible manual strangulation; defendant and codefendant used the victim's debit card and gift card several times; defendant's told an investigator in an interview that defendant played a part and took full responsibility and that defendant's DNA would be found on the victim's pillow; and an inmate testified that defendant confessed to the inmate. *State v. Sarden*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 637 (Tenn. Crim. App. Sept. 25, 2020).

Evidence was sufficient to support defendant's first-degree murder conviction because it showed that he and his codefendant approached the unarmed victim and engaged in an argument, as the victim began to back away defendant pulled out a gun and shot the victim multiple times, defendant and his codefendant fled, and several months later during his arrest the murder weapon was found on the floor underneath the couch where defendant had last been seated. *State v. Harris*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 647 (Tenn. Crim. App. Oct. 1, 2020).

Evidence supported defendant's convictions for first degree premeditated murder and attempted first degree premeditated murder because defendant traded handguns for a high-powered assault rifle; defendant stopped defendant's car at a red light on a street, lowered the window, pointed the rifle toward an unarmed group of people on a sidewalk who did not provoke defendant, and fired a shot, paused, and fired a second shot; and defendant fled the scene and disposed of the rifle during a high-speed police pursuit. *State v. Corbin*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 664 (Tenn. Crim. App. Oct. 9, 2020).

Evidence was sufficient to convict defendant of first-degree murder because defendant left

the living room, walked through the kitchen to the garage, procured a hammer from the garage, returned to the living room, struck the unarmed victim with a deadly weapon while she sat on the couch, and inflicted significant injuries to the victim's head, including multiple skull fractures and brain lacerations; and defendant hid the hammer inside the home, fled the state, and concealed the killing. *State v. Stewart*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 714 (Tenn. Crim. App. Nov. 5, 2020).

Evidence was sufficient to convict defendant of first degree felony murder, criminal attempt to commit second degree murder, aggravated robbery, and employing a firearm during the commission of a felony because defendant and co-defendant, each wielding a deadly weapon, approached the victims on the front porch of a residence; an altercation between the four men ensued; defendant pointed an automatic pistol at the first victim; while brandishing his weapon, co-defendant took cash from each victim and a cell phone from the second victim; when the second victim attempted to defend himself, co-defendant fired five shots; and the second victim later died from his gunshot wounds. *State v. Wilson*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 719 (Tenn. Crim. App. Nov. 10, 2020).

There was sufficient evidence to support defendant's convictions for murder and related offenses, as a rational jury could have concluded that defendant and another waited outside the victim's house, eventually entered the house, shot the victim in the back of the head, stabbed the victim in the neck and lower extremities, bound his hands and feet, and stole \$2500, the victim's prescription slips, the victim's guns, and the victim's truck. *State v. Fleming*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 8 (Tenn. Crim. App. Oct. 13, 2020).

Evidence supported defendant's conviction for facilitation of first-degree, felony murder because defendant and co-defendant trailed the victim in co-defendant's car with the intent to rob the victim, co-defendant stopped and approached the victim with a gun when the victim parked the victim's car and attempted to rob the victim, defendant fatally shot the victim in the head when the victim pulled out a gun, and co-defendant left the victim's purse behind and fled the scene with defendant in co-defendant's car. *State v. Bowen*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 19 (Tenn. Crim. App. Jan. 12, 2021).

Evidence defendant cultivated a relationship with the victim to gain access to the her children, one of whom was the victim's biological grandchild, the victim decided not to let defendant see the children over a weekend, defendant and the victim were seen together in the hours before the victim's badly beaten body was found, stains which were determined to be the victim's blood were found in several loca-

tions in defendant's car, and the victim sustained a brutal attack was sufficient to support a first degree premeditated murder convictions. *State v. Smith*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 61 (Tenn. Crim. App. Feb. 25, 2021).

There was proof upon which a jury could conclude, beyond a reasonable doubt, that defendants intentionally killed the victim with premeditation, including evidence that defendants were angry with the victim for her role in first defendant's arrest, following a physical fight they bound the victim, transported her to a field, and, while she was still alive, lit her on fire. *State v. Williams*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 98 (Tenn. Crim. App. Mar. 19, 2021).

Evidence was sufficient to support defendant's convictions of first-degree felony murder and aggravated child abuse because an expert testified that it was impossible that the victim's injuries occurred while he was a patient at the hospital, that he died within minutes to a couple of hours of receiving his injuries, and both experts testified that the injuries were non-accidental. *State v. Huse*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 102 (Tenn. Crim. App. Mar. 23, 2021).

Evidence was sufficient to support defendant's conviction of first-degree felony murder because it overwhelming showed that he shot the victim twice in the torso while holding him at gunpoint in the course of robbing the store and taking items from the store, including a chain with a large cross on it. *State v. Griffin*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 110 (Tenn. Crim. App. Mar. 24, 2021).

Evidence supported defendant's first-degree premeditated murder and attempted first-degree murder convictions because jailhouse phone calls were entered into evidence in which defendant admitted to shooting at the murder victim, who had stabbed defendant years earlier, and the attempted murder victim when the victims were standing beside each other; defendant said that defendant did not regret what defendant had done; and defendant explained as the reason for defendant's actions that defendant was the most vindictive person in the world. *State v. Smith*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 148 (Tenn. Crim. App. Apr. 13, 2021).

Evidence was sufficient to convict defendant of facilitation of first-degree, felony murder because defendants attempted to rob the victim after seeing her withdraw cash at the bank; defendant knew co-defendant intended to rob the victim when co-defendant approached her in the driveway armed with a gun; defendant furnished substantial assistance in the commission of the attempted robbery by identifying the victim as a target, following the victim in order to rob her, and fleeing the scene after attempting to rob her; and the victim died from

a gunshot wound to the head. *State v. Bowen*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 149 (Tenn. Crim. App. Apr. 13, 2021).

21. —Identity.

Evidence evidence at trial established defendant's identity as the masked assailant at the store because using a trained police dog, the officers were able to track the suspect to a nearby wooded area behind a baseball field, defendant was seen hiding in some bushes in that wooded area, and he responded to the officers' commands to come out with death threats and profanity, after defendant was taken into custody, the police found several items in the immediate vicinity that connected him to the robbery at the store, the police also found a piece of white cloth that was consistent with the white mask worn by the assailant and that was determined to have been cut from a t-shirt found in defendant's bedroom, the clothing, gloves, revolver, and white cloth all contained defendant's DNA. *State v. Miller*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 624 (Tenn. Crim. App. Sept. 18, 2020).

Evidence supported defendant's first degree murder conviction because video surveillance showed someone in clothing similar to defendant's entering and exiting the victim's apartment, a beanie with defendant's DNA and a boot print matching defendant's boot were found nearby, the victim's computer and a knife taken by defendant, defendant pawned a ring from the apartment, defendant's cell phone was used to search for information about a stabbing, and defendant confessed the crime to a jail inmate. *State v. McLawhorn*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 686 (Tenn. Crim. App. Oct. 20, 2020).

Evidence sufficiently identified defendant as perpetrator of a robbery and shooting that resulted in the death of the victim because witnesses testified that they saw defendant with a gun prior to the murder, that defendant told defendant's parent that defendant committed the murder, that defendant tried to persuade a person to be defendant's alibi, that defendant appeared in surveillance photographs of the gas station that was robbed, that defendant burned clothing after the robbery, and that defendant talked about how defendant caught a body. *State v. Fields*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 47 (Tenn. Crim. App. Feb. 10, 2021).

22. —Attempted First Degree Murder.

23. —Premeditation.

Evidence was sufficient to support defendant's conviction of first-degree murder because it showed that he and the victim had been feuding, while the victim was inside the market defendant pulled into the parking lot

and blocked his car, and defendant immediately began firing at the victim as the victim walked out of the market. *State v. Thompson*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 573 (Tenn. Crim. App. Aug. 20, 2020).

Evidence was sufficient to support defendant's conviction of premeditated first-degree murder because he made preparations to conceal his identity prior to the killing by cutting a mask from a t-shirt, he used a deadly weapon against an unarmed victim, immediately prior to the shooting defendant threatened that he would shoot him in the head if the victim did not comply with defendant's demands, he fired one shot that narrowly missed the victim's head, and defendant fatally shot the victim in the back of the head. *State v. Miller*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 624 (Tenn. Crim. App. Sept. 18, 2020).

Defendant acted with the intent to kill and with premeditation in that defendant traded handguns for a high-powered assault rifle; defendant stopped defendant's car at a red light on a street, lowered the window, pointed the rifle toward an unarmed group of people on a sidewalk who did not provoke defendant, and fired a shot, paused, and fired a second shot; and defendant fled the scene and disposed of the rifle during a high-speed police pursuit. *State v. Corbin*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 664 (Tenn. Crim. App. Oct. 9, 2020).

Rational jury could have found that defendant's killing of the victim was premeditated and intentional, as the victim's roommate observed defendant come to the victim's home the day the victim died, surveillance video showed defendant carrying something heavy in his jacket pocket when he entered the home, defendant acknowledged hitting the victim with a sledgehammer, and defendant destroyed evidence of the killing. *State v. Oeser*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 795 (Tenn. Crim. App. Dec. 11, 2020).

Defendant's claim that the State failed to establish evidence of premeditation as to the charge of attempted first-degree murder against the victim's unborn child failed, as the record established that prior to the attack, defendant expressed his desire for the victim's child to be aborted if male, and within hours of learning the baby was a boy, defendant carried out an attack on the victim during which he directly stabbed her in the stomach and stated he intended to kill the baby. *State v. Estes*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 14 (Tenn. Crim. App. Jan. 6, 2021).

Evidence was sufficient to support defendant's convictions for attempted first-degree murder because defendant by his own admissions stated that he was not drunk when he fired the shots at the officers and bystanders, defendant declared an intent to kill his girlfriend when he pointed a handgun at her head

inside their bedroom, he used two different rifles to shoot at the victims at least 52 times, he emptied the clips from both rifles, he made impact with all three police vehicles and he hit his girlfriend and a deputy, and he left and went to hide in a nearby cave when a sergeant returned fire. *State v. Pitts*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 71 (Tenn. Crim. App. Mar. 4, 2021).

Evidence was sufficient to support defendant's conviction for first degree premeditated murder because it showed that defendant strangled the victim and she died from her injuries, the victim had bruising on her neck and petechiae in her eyes and lips consistent with strangulation, and defendant stated in his police interview that he choked the victim until she went limp and then placed her in the bathtub to make it look like a suicide. On the day before the murder, defendant wrote a note on his cell phone detailing the story he would give to police after the murder. *State v. Bell*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 73 (Tenn. Crim. App. Mar. 3, 2021).

Evidence was sufficient to support defendant's conviction of first-degree premeditated murder because, even though defendant argued that he killed the victim during a heated argument, the evidence showed that the victim was killed by multiple blows to the face and skull with a hammer, the medical examiner counted 14 separate impact sites on the victim's skull, there was no evidence of a struggle, and the victim was unarmed with no defensive wounds. *State v. Long*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 81 (Tenn. Crim. App. Mar. 8, 2021).

Evidence that defendant fled in his car at high speeds from the police officer victim, fired two shots from a pump-action shotgun striking the victim's patrol car, continued to flee, fired a shotgun blast striking the victim in the arm and then fired four more shots before fleeing the scene was sufficient to support defendant's attempted first degree murder conviction. *State v. Wilson*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 122 (Tenn. Crim. App. Mar. 31, 2021).

26. Sentencing.

Trial court did not err in sentencing defendant to 40 years for the facilitation of first-degree, felony murder conviction and 20 years for the attempted especially aggravated robbery conviction because the trial court properly considered defendant's criminal history and the statutory criteria in finding defendant to be a Range II, multiple offender; the trial court reviewed the presentence report, the nature and characteristics of the criminal conduct involved, the applicable enhancement and mitigating factors, and defendant's potential for rehabilitation; and the presentence report listed defendant's criminal history which began in 1995 at the age of 16 and included numerous misdemeanor and felony convictions. *State v.*

Bowen, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 149 (Tenn. Crim. App. Apr. 13, 2021).

39-13-204. Sentencing for first degree murder.

NOTES TO DECISIONS

ANALYSIS

11. Aggravating Circumstances.
14. —Previous Conviction of a Felony.
29. Evidence Admissible.

11. Aggravating Circumstances.

With regard to defendant's conviction for premeditated first degree murder, the record supported the jury's finding that the murder was committed while defendant had a substantial role in attempting to commit a robbery because the killing of the victim occurred between defendant's demand for money and his attempt to open the cash register. *State v. Miller*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 624 (Tenn. Crim. App. Sept. 18, 2020).

14. —Previous Conviction of a Felony.

Evidence supported the jury's finding that defendant was previously convicted of a violent

felony because the State admitted into evidence a certified judgment of defendant's 2009 conviction for aggravated robbery in Madison County, as well as a written statement from defendant admitting his role in that robbery. *State v. Miller*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 624 (Tenn. Crim. App. Sept. 18, 2020).

29. Evidence Admissible.

Trial court did not abuse its discretion in admitting the video of defendant's prior aggravated robbery during the capital sentencing phase because defendant did not make a specific argument as to how the admission of the video violated a specific constitutional right, such as the right to due process or the right to confront adverse witnesses. *State v. Miller*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 624 (Tenn. Crim. App. Sept. 18, 2020).

39-13-206. Appeal and review of death sentence.

NOTES TO DECISIONS

13.5 Aggravating Factors Outweighed Mitigating Factors.

Rational trier of fact could have found that the aggravating circumstances outweighed any mitigating circumstances beyond a reasonable doubt because the experts agreed that defendant was capable of formulating and carrying out a plan to rob the store and that he made a voluntary choice to kill the victim, this was

not the first time that defendant was involved in the armed robbery of a convenience store, he had only been out of prison for about six months at the time of this incident, and he responded with profanities and death threats when he was confronted by the police. *State v. Miller*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 624 (Tenn. Crim. App. Sept. 18, 2020).

39-13-210. Second degree murder.

NOTES TO DECISIONS

ANALYSIS

6. Attempt.
10. Evidence.
12. —Sufficient.
16. Sentencing.

6. Attempt.

Where a doctor testified that the stick which was surgically removed from the victim's throat was potentially life-threatening, the jury could have reasonably the evidence was sufficient to

sustain defendant's conviction of attempted second degree murder. *State v. Boyd*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 745 (Tenn. Crim. App. Nov. 19, 2020).

Evidence was sufficient to support defendant's conviction for attempted second degree murder because defendant's statement, "this ain't happening," together with his pointing the gun at the officer and pulling the trigger, showed that defendant acted with the intent to commit a knowing killing. *State v. Moon*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 55 (Tenn. Crim. App. Feb. 14, 2021).

10. Evidence.**12. —Sufficient.**

Evidence was sufficient to convict defendant of second degree murder because defendant's conduct was reasonably certain to cause the victim's death based upon the use of a big carving knife to stab the victim twice; the depth of those wounds, as well as the significant force needed to inflict the frontal wound; and his failure to seek immediate medical assistance for the victim. *State v. Robinson*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 553 (Tenn. Crim. App. Aug. 13, 2020).

Evidence was sufficient to sustain defendant's conviction for second-degree murder because he admitted to shooting the victim numerous times, after defendant knocked on the front door the victim indicated he did not want the defendant in the home and an altercation ensued, defendant fired two gunshots, as the victim ran defendant fired two additional gunshots at the victim's back, defendant then approached the victim, who was incapacitated on the ground, and shot him in the chest. *State v. Walton*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 571 (Tenn. Crim. App. Aug. 20, 2020).

Evidence that the surviving victim saw defendant with a gun, saw the deceased victim grab his chest, and defendant shot the surviving victim in the face and knee was sufficient to support defendant's convictions for second degree murder and attempted second degree murder. *State v. Jones*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 575 (Tenn. Crim. App. Aug. 25, 2020).

Evidence was sufficient to support defendant's conviction of attempted second degree murder because the video from the store's security cameras showed that defendant looked in the store employee's direction prior to approaching the service counter and demanding money from the victim, and after shooting the victim, defendant turned and fired his gun once in the direction of the fleeing employee. *State v. Miller*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 624 (Tenn. Crim. App. Sept. 18, 2020).

Evidence was sufficient for a rational trier of fact to find beyond a reasonable doubt that defendant knowingly attempted to kill a deputy where it showed that the deputy spotted the defendant speeding and attempted to effectuate a traffic stop, defendant failed to stop and led the deputy on a chase for approximately 20 minutes, and when defendant stopped his car, he exited his vehicle while holding a gun in his left hand and fired at least one shot in the direction of the deputy, who was outside of his vehicle at that point. *State v. Ochoa-Puentes*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 643 (Tenn. Crim. App. Sept. 29, 2020).

Evidence was sufficient to convict defendant of first degree felony murder, criminal attempt to commit second degree murder, aggravated

robbery, and employing a firearm during the commission of a felony because defendant and co-defendant, each wielding a deadly weapon, approached the victims on the front porch of a residence; an altercation between the four men ensued; defendant pointed an automatic pistol at the first victim; while brandishing his weapon, co-defendant took cash from each victim and a cell phone from the second victim; when the second victim attempted to defend himself, co-defendant fired five shots; and the second victim later died from his gunshot wounds. *State v. Wilson*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 719 (Tenn. Crim. App. Nov. 10, 2020).

Evidence was sufficient to convict defendant of second degree murder, and not voluntary manslaughter, as defendant committed a knowing killing rather than a killing due to adequate provocation because, after having sex with the victim, defendant followed the victim through the parking lot as he thought the victim had stolen his wallet; the victim confronted defendant with a knife; defendant punched the victim, and the victim dropped the knife; defendant then picked up the knife; he stabbed the victim in the neck, and then 20 more times; and he agreed that his response to the victim's aggression was not reasonable. *State v. Gadsden*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 739 (Tenn. Crim. App. Nov. 19, 2020).

Evidence was sufficient to support defendant's convictions of second degree murder, attempted second degree murder, and employing a firearm during the commission of a dangerous felony because it showed that defendant had previously shot the victim, they got into an argument at a store, when the victim and his friend left the store on a scooter defendant and his friends began shooting them, the victim's friend identified defendant as one of the men who shot at them, and the victim's cause of death was two gunshot wounds to the chest. *State v. Stevenson*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 798 (Tenn. Crim. App. Dec. 16, 2020).

Evidence was sufficient to support defendant's conviction for second degree murder under a theory of criminal responsibility because a reasonable juror could find beyond a reasonable doubt that defendant knowingly participated in the knowing killing of the victim and that he was aware that the shooting could result in the victim's death; either defendant or co-defendant threw a bottle at the back of the victim's head, causing the victim to turn around towards them, co-defendant shot the victim in the chest, and both defendant and co-defendant jumped into defendant's car and fled the scene. *State v. Deberry*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 49 (Tenn. Crim. App. Feb. 10, 2021).

There was sufficient evidence to support defendant's conviction for second degree murder,

as a reasonable jury could have concluded that defendant knew her actions in fatally assaulting the victim would lead to the death of the fetal victim. *State v. Smith*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 61 (Tenn. Crim. App. Feb. 25, 2021).

Evidence was sufficient to support defendant's conviction for second-degree murder because the evidence showed that defendant and the victim were alone in the kitchen of a house when a gunshot rang out, witnesses ran into the kitchen and saw defendant standing over the victim with a gun in defendant's hand, and the victim sustained a fatal gunshot wound to the chest. *State v. Olive*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 68 (Tenn. Crim. App. Mar. 3, 2021).

16. Sentencing.

Trial court did not err by sentencing defendant to 22 years incarceration for his conviction of second-degree murder because it was a within-range sentence and it properly determined that the use of a deadly weapon and exceptional cruelty enhancement factors outweighed any mitigating factors, as defendant fired numerous fatal shots at the victim, first in the back and then, after consideration, in the chest, from a close range. *State v. Walton*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 571 (Tenn. Crim. App. Aug. 20, 2020).

Defendant's 24-year sentence for second degree murder was appropriate because he treated the victim with exceptional cruelty by stabbing the victim in the neck and an additional 20 times; he abused a position of private trust; he did not act under strong provocation as he disarmed the victim and the threat was terminated; and he did not murder the victim under such unusual circumstances that he did not have a sustained intent to violate the law as he stabbed the victim 21 times. *State v. Gadsden*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 739 (Tenn. Crim. App. Nov. 19, 2020).

Trial court properly exercised its discretion in ordering defendant to serve a within-range sentence of thirty years for second degree murder because it found that multiple enhancement factors applied; the trial court determined that defendant had a history of criminal convictions or behavior in addition to those necessary to establish the appropriate range, that he had committed murder while on probation for another offense, that he had no hesitation about committing a crime when the risk to human life was high, and that he employed or possessed a firearm during the commission of the murder. *State v. Deberry*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 49 (Tenn. Crim. App. Feb. 10, 2021).

39-13-211. Voluntary manslaughter.

NOTES TO DECISIONS

ANALYSIS

1. Provocation.
5. Evidence Sufficient.
- 5.5. Evidence Insufficient.

1. Provocation.

Evidence was sufficient to convict defendant of second degree murder, and not voluntary manslaughter, as defendant committed a knowing killing rather than a killing due to adequate provocation because, after having sex with the victim, defendant followed the victim through the parking lot as he thought the victim had stolen his wallet; the victim confronted defendant with a knife; defendant punched the victim, and the victim dropped the knife; defendant then picked up the knife; he stabbed the victim in the neck, and then 20 more times; and he agreed that his response to the victim's aggression was not reasonable. *State v. Gadsden*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 739 (Tenn. Crim. App. Nov. 19, 2020).

5. Evidence Sufficient.

Evidence was sufficient for the jury to reject defendant's claim of self-defense and find him

guilty of voluntary manslaughter, attempted voluntary manslaughter, and employing a firearm during the commission of a dangerous felony, as the proof at trial was that multiple shots were fired from the direction of defendant's porch toward the location of the victim's car and a second victim was shot in the back while he seated in the rear seat of the car, which was driving away from the scene at the time. *State v. Howard*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 27 (Tenn. Crim. App. Jan. 15, 2021).

Evidence supported defendant's conviction for attempted voluntary manslaughter, given that he and the victim engaged in a physical altercation prior to the shooting, defendant threatened that he had a gun, then retrieved a gun from his home, aimed the gun at the victim, and fired at least one shot at him. The trial court could reasonably find that defendant knowingly shot at the victim with the intent to kill him. *State v. Burgess*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 88 (Tenn. Crim. App. Mar. 12, 2021).

5.5. Evidence Insufficient.

Evidence was insufficient to support defendant's conviction for voluntary manslaughter

as no evidence, direct or circumstantial, was introduced at trial to support a conclusion that the perpetrator who shot the victim in the head acted in a state of passion, produced by adequate provocation, which was legally sufficient to cause a reasonable person to act in an irrational manner. *State v. Lumpkin*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 809 (Tenn. Crim. App. Dec. 23, 2020).

Defendant's conviction for second-degree murder, rather than voluntary manslaughter, was appropriate because there was a lack of

provocation as it appeared that the argument between defendant and the victim had subsided; the wound to the victim suggested that defendant got up from a table, backed away, and then fired a gun at the victim; defendant was overheard to say, "You got what you deserved, bitch;" the evidence suggested that defendant concealed the weapon, and defendant told the police that the shooting was an accident. *State v. Olive*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 68 (Tenn. Crim. App. Mar. 3, 2021).

39-13-213. Vehicular homicide.

NOTES TO DECISIONS

1. Evidence Sufficient.

Evidence was sufficient for the jury to conclude beyond a reasonable doubt that defendant was intoxicated at the time of the crash because his urine tested positive for his urine tested positive for methamphetamine, amphetamine, and oxycodone, in addition to the cognitive and speech problems observed by medical

personnel at the hospital defendant was loud, uncooperative, and aggressive, he admitted to nurses that he was an IV drug user, and he admitted to taking oxycodone 38 hours before the crash. *State v. Franklin*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 511 (Tenn. Crim. App. July 27, 2020).

39-13-215. Reckless homicide.

NOTES TO DECISIONS

2. Evidence Sufficient.

Evidence was sufficient to support a conviction for the lesser-included offense of reckless homicide because defendant was a perpetrator of the offense under a theory of criminal responsibility; and defendant acted recklessly with respect to the circumstances surrounding the

conduct or the result of the conduct as he was aware of but consciously disregarded a substantial and unjustifiable risk that the circumstances existed or the result would occur. *State v. Lumpkin*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 809 (Tenn. Crim. App. Dec. 23, 2020).

PART 3 KIDNAPPING AND FALSE IMPRISONMENT

39-13-302. False imprisonment.

NOTES TO DECISIONS

4. Evidence Sufficient.

State proved that the especially aggravated kidnappings were not incidental to the aggravated robberies, and therefore defendant's convictions of especially aggravated kidnapping were affirmed, because, while the victims may have felt no more confined than they would have in a normal robbery, the jury could have reasonably inferred that the purpose of forcing the victims to disrobe was to prevent their summoning assistance or for the purpose of deterring any attempt to thwart the robbery. *State v. Curry*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 616 (Tenn. Crim. App. Sept. 17, 2020).

Evidence supported defendant's conviction for kidnapping because the victim, defendant's paramour, testified that defendant strangled the victim following an argument until the victim lost consciousness and hit the victim with a motorcycle helmet, threatened to kill the victim, blocked the victim's exit from a bedroom with a large mirror, hit the victim and tried to have sex with the victim, turned the lights off and told the victim to stay in bed with defendant until the morning, and allowed the victim to go into the kitchen the next morning. *State v. Mansir*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 635 (Tenn. Crim. App. Sept. 25, 2020).

Evidence was sufficient to support defendant's conviction of aggravated kidnapping be-

cause he acknowledged that he opened the door of the victim's trailer for the second victim and led her to a bedroom where he made her sit down on the bed, he taped the second victim's hands and feet to a chair, took medication from

her purse, left her in the bedroom, and drove the victim's truck away a short time later. *State v. Helmick*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 104 (Tenn. Crim. App. Mar. 23, 2021).

39-13-303. Kidnapping.

NOTES TO DECISIONS

3. Evidence Sufficient.

Evidence supported defendant's conviction for kidnapping because the victim, defendant's paramour, testified that defendant strangled the victim following an argument until the victim lost consciousness and hit the victim with a motorcycle helmet, threatened to kill the victim, blocked the victim's exit from a bedroom

with a large mirror, hit the victim and tried to have sex with the victim, turned the lights off and told the victim to stay in bed with defendant until the morning, and allowed the victim to go into the kitchen the next morning. *State v. Mansir*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 635 (Tenn. Crim. App. Sept. 25, 2020).

39-13-304. Aggravated kidnapping.

NOTES TO DECISIONS

ANALYSIS

4. Evidence.
6. —Sufficient.

4. Evidence.

6. —Sufficient.

Evidence was sufficient to support defendant's convictions of three counts of aggravated assault and one count of aggravated kidnapping because it showed that during an argument defendant forced the victim into a chair, he blocked the victim from leaving the residence and grabbed her by the neck, and when

the victim tried to leave again defendant brandished a knife and told her she would only leave in a body bag. *State v. Stevens*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 626 (Tenn. Crim. App. Sept. 21, 2020).

Evidence was sufficient to support defendant's conviction of aggravated kidnapping because he acknowledged that he opened the door of the victim's trailer for the second victim and led her to a bedroom where he made her sit down on the bed, he taped the second victim's hands and feet to a chair, took medication from her purse, left her in the bedroom, and drove the victim's truck away a short time later. *State v. Helmick*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 104 (Tenn. Crim. App. Mar. 23, 2021).

39-13-305. Especially aggravated kidnapping.

NOTES TO DECISIONS

ANALYSIS

4. Evidence.
5. —Sufficient.
8. Sentence.

4. Evidence.

5. —Sufficient.

State proved that the especially aggravated kidnappings were not incidental to the aggravated robberies, and therefore defendant's convictions of especially aggravated kidnapping were affirmed, because, while the victims may have felt no more confined than they would have in a normal robbery, the jury could have

reasonably inferred that the purpose of forcing the victims to disrobe was to prevent their summoning assistance or for the purpose of deterring any attempt to thwart the robbery. *State v. Curry*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 616 (Tenn. Crim. App. Sept. 17, 2020).

Evidence was sufficient to establish serious bodily injury, and therefore defendant's conviction of especially aggravated kidnapping was affirmed, because the record showed that defendant repeatedly struck the victim resulting in her losing consciousness multiple times, defendant had to support her while walking, she could not shower or walk from the shower to the hotel bed unassisted, her eyes were so swollen from the beating that she could not see the

hotel telephone and had to feel around for the cord, and she suffered a laceration on her head that bled, a hematoma to the back of the head, extremely swollen facial features that prevented paramedics from examining the victim's eyes and mouth, a broken nose and eye socket that required surgery, and a neck sprain. *State v. Evans*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 623 (Tenn. Crim. App. Sept. 18, 2020).

There was sufficient evidence that, with the use of zip-ties and ratchet straps, defendants confined the victim to the kitchen thereby substantially interfering with her ability to move, leave the apartment, or struggle against the defendants as they transported her to the field and thus, to support their conviction for espe-

cially aggravated kidnapping. *State v. Williams*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 98 (Tenn. Crim. App. Mar. 19, 2021).

8. Sentence.

Defendant's contention that the trial court failed to consider the mitigating factor of voluntarily releasing the victims alive was rejected because the record showed that the trial court properly considered this mitigating factor in sentencing and found that it was outweighed by the other enhancement factors submitted the State. *State v. Curry*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 616 (Tenn. Crim. App. Sept. 17, 2020).

PART 4 ROBBERY

39-13-401. Robbery.

NOTES TO DECISIONS

ANALYSIS

9. Evidence.
11. —Sufficient.

9. Evidence.

11. —Sufficient.

Evidence was sufficient to establish defendant's identity as the perpetrator because the victim testified to being robbed by masked and armed men in the victim's home, a police officer saw an individual matching the description of one of the assailants, a police dog tracked the individual to where defendant came out from behind a shed and said, "I give up," a gun was found in a nearby trash can, the victim identified defendant in a show-up identification, and defendant made incriminating statements during recorded telephone calls while in jail. *State v. Ward*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 516 (Tenn. Crim. App. July 28, 2020).

Evidence supported defendant's first-degree felony murder and robbery convictions because the forensic pathologist testified that the victim's cause of death was suffocation, blunt force injuries, and possible manual strangulation; defendant and codefendant used the victim's debit card and gift card several times; defendant told an investigator in an interview that defendant played a part and took full responsibility and that defendant's DNA would be found on the victim's pillow; and an inmate testified that defendant confessed to the inmate. *State v. Sarden*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 637 (Tenn. Crim. App. Sept. 25, 2020).

Evidence sufficiently identified defendant as perpetrator of a robbery and shooting that resulted in the death of the victim because witnesses testified that they saw defendant with a gun prior to the murder, that defendant told defendant's parent that defendant committed the murder, that defendant tried to persuade a person to be defendant's alibi, that defendant appeared in surveillance photographs of the gas station that was robbed, that defendant burned clothing after the robbery, and that defendant talked about how defendant caught a body. *State v. Fields*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 47 (Tenn. Crim. App. Feb. 10, 2021).

Evidence supported defendant's convictions of aggravated robbery, robbery, and theft because the evidence—in the form of store surveillance videos, defendant's clothing, defendant's DNA, and the BB gun and money found in the car in which defendant was a passenger—was sufficient to establish defendant's identity as the perpetrator who took a BB gun from a retail store without paying for it and then took cash from convenience stores by putting the clerks in fear and while brandishing the weapon at one store. *State v. Schubert*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 83 (Tenn. Crim. App. Mar. 9, 2021).

Evidence was sufficient to support defendant's conviction of first-degree felony murder because it overwhelming showed that he shot the victim twice in the torso while holding him at gunpoint in the course of robbing the store and taking items from the store, including a chain with a large cross on it. *State v. Griffin*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 110 (Tenn. Crim. App. Mar. 24, 2021).

39-13-402. Aggravated robbery.**NOTES TO DECISIONS****ANALYSIS**

10. Evidence.
11. —Sufficient.
12. —Insufficient.
13. —Identity.
15. Sentencing.

10. Evidence.**11. —Sufficient.**

Evidence was sufficient to support defendant's conviction of aggravated robbery because the victim testified defendant approached him at the cash register and placed a gun against his back, the victim believed the gun felt and looked like a .38 caliber revolver, defendant demanded the money in the cash register and threatened the victim, and because the victim was afraid defendant would shoot him, he gave defendant the money from the cash register. *State v. Nix*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 482 (Tenn. Crim. App. July 15, 2020).

In a case in which defendant was convicted of two counts of aggravated robbery, the evidence was sufficient beyond a reasonable doubt to support defendant's conviction on one of the counts. The victim testified that she was in the kitchen when the assailants broke into the house and pointed a gun at her while ordering her to the floor, and defendant himself admitted that one of his accomplices took eighty dollars from her. *State v. Banks*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 583 (Tenn. Crim. App. Aug. 25, 2020).

Evidence was sufficient to support second and third defendants' convictions for aggravated robbery, theft, conspiracy, aggravated burglary, and firearms offenses, as it showed that first defendant devised a plan to conduct a home invasion and steal stuff, he enlisted others, including second and third defendants, to carry out the plan, and the group carried out the plan, which included the use of masks, gloves, and a gun to take the items from the victim's home. *State v. Morales*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 619 (Tenn. Crim. App. Sept. 18, 2020).

Evidence supported defendant's first-degree felony murder and robbery convictions because the forensic pathologist testified that the victim's cause of death was suffocation, blunt force injuries, and possible manual strangulation; defendant and codefendant used the victim's debit card and gift card several times; defendant told an investigator in an interview that defendant played a part and took full responsibility and that defendant's DNA would be found

on the victim's pillow; and an inmate testified that defendant confessed to the inmate. *State v. Sarden*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 637 (Tenn. Crim. App. Sept. 25, 2020).

Evidence was sufficient to convict defendant of first degree felony murder, criminal attempt to commit second degree murder, aggravated robbery, and employing a firearm during the commission of a felony because defendant and co-defendant, each wielding a deadly weapon, approached the victims on the front porch of a residence; an altercation between the four men ensued; defendant pointed an automatic pistol at the first victim; while brandishing his weapon, co-defendant took cash from each victim and a cell phone from the second victim; when the second victim attempted to defend himself, co-defendant fired five shots; and the second victim later died from his gunshot wounds. *State v. Wilson*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 719 (Tenn. Crim. App. Nov. 10, 2020).

Evidence was sufficient to convict defendant of aggravated robbery because the victim was robbed at gunpoint by two perpetrators; the victim's friend was present during the robbery and later identified defendant as one of the armed perpetrators of the offense; a gun box matching the same type of gun used in the robbery was seized from defendant's mother's home and photographs of defendant holding the same type of gun were admitted into evidence; and, after waiving her rights under *Miranda*, defendant confessed to the armed robbery of the victim. *State v. Gore*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 736 (Tenn. Crim. App. Nov. 18, 2020).

Evidence that defendant and codefendant followed the victim and her son from the store and defendant approached the victim, pointed a gun at her and demanded her belongings, pointed the gun at the son and threatened to shoot him if he did not stop crying, and that the victim's cellular phone, wallet containing cash, and her purchases from the store were taken during the robbery was sufficient to support defendant's aggravated robbery conviction. *State v. Harrison*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 742 (Tenn. Crim. App. Nov. 19, 2020).

Evidence supported defendant's conviction for aggravated robbery because the victim and defendant's accomplice testified that the accomplice came to the victim's house to meet with the victim to engage in sexual activity and that defendant entered the victim's house without permission, fired a gun, and took property from the victim by placing the victim in fear for the victim's safety. *State v. Rogers*, — S.W.3d —,

2020 Tenn. Crim. App. LEXIS 747 (Tenn. Crim. App. Nov. 20, 2020).

Evidence was sufficient to sustain defendant's convictions for especially aggravated robbery and aggravated assault, as the record indicated defendant hit the victim in the back of the head three times with a hatchet and stole \$13.00 and a bus pass from the victim's pocket and the victim testified that as a result of the attack he lost consciousness, suffered a skull fracture, received nearly thirty stitches, remained scarred and disfigured, and continued to experience pain and dizziness. *State v. Goff*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 768 (Tenn. Crim. App. Nov. 30, 2020).

Because there was sufficient evidence to support defendant's convictions, the trial court's order granting the motion for judgment of acquittal on the offense of aggravated robbery was vacated, and the jury's verdict finding defendant guilty of that offense was reinstated. *State v. Harris*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 59 (Tenn. Crim. App. Feb. 23, 2021).

Evidence was sufficient to convict defendant of carjacking and aggravated robbery under a theory of criminal responsibility because defendant was associated with the venture, acted with knowledge that co-defendant was going to hold the victim at gunpoint, engaged in the assault on the victim, and shared in the criminal intent to take the victim's car and property by force. *State v. Harris*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 59 (Tenn. Crim. App. Feb. 23, 2021).

12. —Insufficient.

In a case in which defendant was convicted of two counts of aggravated robbery, there was no evidence of any bodily injury to one of the victims. Therefore, the conviction on that count was subject to reversal in its entirety and dismissal with prejudice due to insufficient evidence. *State v. Banks*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 583 (Tenn. Crim. App. Aug. 25, 2020).

13. —Identity.

Evidence was sufficient to establish defendant's identity as the perpetrator because the victim testified to being robbed by masked and armed men in the victim's home, a police officer saw an individual matching the description of one of the assailants, a police dog tracked the individual to where defendant came out from

behind a shed and said, "I give up," a gun was found in a nearby trash can, the victim identified defendant in a show-up identification, and defendant made incriminating statements during recorded telephone calls while in jail. *State v. Ward*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 516 (Tenn. Crim. App. July 28, 2020).

Evidence sufficiently identified defendant as perpetrator of a robbery and shooting that resulted in the death of the victim because witnesses testified that they saw defendant with a gun prior to the murder, that defendant told defendant's parent that defendant committed the murder, that defendant tried to persuade a person to be defendant's alibi, that defendant appeared in surveillance photographs of the gas station that was robbed, that defendant burned clothing after the robbery, and that defendant talked about how defendant caught a body. *State v. Fields*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 47 (Tenn. Crim. App. Feb. 10, 2021).

Evidence supported defendant's convictions of aggravated robbery, robbery, and theft because the evidence?in the form of store surveillance videos, defendant's clothing, defendant's DNA, and the BB gun and money found in the car in which defendant was a passenger?was sufficient to establish defendant's identity as the perpetrator who took a BB gun from a retail store without paying for it and then took cash from convenience stores by putting the clerks in fear and while brandishing the weapon at one store. *State v. Schubert*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 83 (Tenn. Crim. App. Mar. 9, 2021).

15. Sentencing.

Defendant's 12-year sentence was appropriate as she was subject to a sentencing range of 8-12 years for aggravated robbery; she had a prior history of criminal convictions consisting of sale or possession of felony drugs, misdemeanor stalking and domestic assault, and a driving related offense; no mitigation factors applied; and defendant did not show any remorse or acceptance of responsibility. *State v. Gore*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 736 (Tenn. Crim. App. Nov. 18, 2020).

Trial court improperly merged the aggravated robbery and carjacking offenses as aggravated robbery was not an alternative count to carjacking. *State v. Harris*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 59 (Tenn. Crim. App. Feb. 23, 2021).

39-13-403. Especially aggravated robbery.**NOTES TO DECISIONS****ANALYSIS**

6. Evidence Sufficient.
8. Sentencing.

6. Evidence Sufficient.

Evidence was sufficient to find defendant guilty of especially aggravated robbery as a principle offender or under a theory of criminal responsibility because defendant and his accomplices pointed their guns at the victim; the victim gave them his wallet, and one of them took the victim's money from the victim's hand and also demanded the victim's cell phone; the victim punched the individual when he reached for the victim's cell phone, and one of the accomplices ran up to the victim and shot him in the head; and the victim suffered serious bodily injury, and later died from his wound. *State v. Lumpkin*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 809 (Tenn. Crim. App. Dec. 23, 2020).

Evidence supported defendant's conviction for attempted especially aggravated robbery because defendant and co-defendant trailed the victim in co-defendant's car with the intent to rob the victim, co-defendant stopped and approached the victim with a gun when the victim parked the victim's car and attempted to rob the victim, defendant fatally shot the victim in the head when the victim pulled out a gun, and co-defendant left the victim's purse behind and fled the scene with defendant in co-defendant's car. *State v. Bowen*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 19 (Tenn. Crim. App. Jan. 12, 2021).

Evidence was sufficient to convict defendant of attempted especially aggravated robbery because, after defendants saw the victim withdraw money from a bank, defendants followed

the victim in order to rob her; when the victim pulled into a driveway, co-defendant exited his vehicle armed with a gun, approached the victim, and attempted to rob her; the victim resisted, and co-defendant shot her in the head; and defendant associated himself with and aided in committing the planned robbery and acted to promote or assist in the commission of the robbery from which he intended to benefit. *State v. Bowen*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 149 (Tenn. Crim. App. Apr. 13, 2021).

8. Sentencing.

In a case in which defendant was convicted of, inter alia, especially aggravated robbery, the trial court considered the relevant principles and sentenced defendant to a within-range sentence of eighteen years. As such, defendant was not entitled to relief. *State v. Banks*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 583 (Tenn. Crim. App. Aug. 25, 2020).

Trial court did not err in sentencing defendant to 40 years for the facilitation of first-degree, felony murder conviction and 20 years for the attempted especially aggravated robbery conviction because the trial court properly considered defendant's criminal history and the statutory criteria in finding defendant to be a Range II, multiple offender; the trial court reviewed the presentence report, the nature and characteristics of the criminal conduct involved, the applicable enhancement and mitigating factors, and defendant's potential for rehabilitation; and the presentence report listed defendant's criminal history which began in 1995 at the age of 16 and included numerous misdemeanor and felony convictions. *State v. Bowen*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 149 (Tenn. Crim. App. Apr. 13, 2021).

39-13-404. Carjacking.**NOTES TO DECISIONS****ANALYSIS**

5. Evidence Sufficient.
7. Sentence.

5. Evidence Sufficient.

Evidence was sufficient to convict defendant of carjacking and aggravated robbery under a theory of criminal responsibility because defendant was associated with the venture, acted with knowledge that co-defendant was going to hold the victim at gunpoint, engaged in the

assault on the victim, and shared in the criminal intent to take the victim's car and property by force. *State v. Harris*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 59 (Tenn. Crim. App. Feb. 23, 2021).

7. Sentence.

Trial court improperly merged the aggravated robbery and carjacking offenses as aggravated robbery was not an alternative count to carjacking. *State v. Harris*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 59 (Tenn. Crim. App. Feb. 23, 2021).

PART 5 SEXUAL OFFENSES

39-13-501. Definitions for §§ 39-13-501 — 39-13-511.**NOTES TO DECISIONS**

ANALYSIS

2. Coercion.
4. Sexual Contact.
8. Evidence Sufficient.
9. Instructions.

2. Coercion.

Evidence was insufficient to support defendant's rape conviction because there was no evidence of force or coercion, as the victim recanted her allegation at trial, defendant's confession included no details that could be construed as force or coercion, and the State was not permitted to use the victim's statements contained on a video recording as substantive evidence of defendant's guilt as it did not satisfy the requirements of Tenn. R. Evid. 803(26) and it did not seek the admission of the video. *State v. Wyse*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 687 (Tenn. Crim. App. Oct. 20, 2020).

4. Sexual Contact.

Kissing cannot be construed as an act of aggravated sexual battery. *McKaughan v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 21 (Tenn. Crim. App. Jan. 13, 2021).

8. Evidence Sufficient.

Evidence was sufficient to convict defendant of rape of a child because, one night in September 2010, defendant pulled the victim onto his lap, pulled out his sexual organ, and asked the victim to play with it; defendant penetrated the victim's private parts with his sexual organ; and the victim was 12 years old at the time. *State v. Fields*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 578 (Tenn. Crim. App. Aug. 25, 2020).

Evidence was sufficient to convict defendant of rape as defendant had parental authority over the victim as he raised the victim from the time she was three years old; the victim agreed that she was not close with her father and that she viewed defendant as a second father; defendant abused his parental authority - a position of extraordinary trust - and began to groom the victim to become a sexual partner at the age of 11, if not earlier; and defendant engaged in extreme emotional manipulation to convince the victim that she was in a healthy dating relationship, when in fact she was abused and controlled by defendant such that she felt her home to be a prison. *State v. Mason*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 582 (Tenn. Crim. App. Aug. 25, 2020).

Evidence was sufficient to convict defendant of two counts of aggravated sexual battery because, during the first incident, defendant held up her legs, touched her breasts below her shirt, and ejaculated; and, during the second incident, defendant held up her legs, touched her breasts above her clothes, and ejaculated. *State v. Breeden*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 627 (Tenn. Crim. App. Sept. 21, 2020).

Evidence was sufficient to convict defendant of three counts of rape of a child because, as to the first incident, defendant rubbed his sexual organ on her privates, he unsuccessfully attempted to insert his sexual organ into her privates, and she described pain every time that he tried, from which the jury could have reasonably inferred that penetration, however slight, occurred; as to the second incident, defendant rubbed his sexual organ on her privates and attempted to insert his sexual organ into her privates, and the victim described pain during the incident; and, as to the third incident, defendant pushed the victim's head down, and had her place her mouth on his sexual organ. *State v. Breeden*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 627 (Tenn. Crim. App. Sept. 21, 2020).

Evidence was sufficient to support defendant's conviction of aggravated sexual battery; while the seven-year-old victim was alone taking a bath, defendant entered the bathroom and touched her genital area, and at the time the victim's mother was out of the house and her godmother was listening to music and unable to hear activity in the bathroom. A jury could have reasonably construed the touching as being for the purpose of sexual arousal or gratification. *State v. Gardner*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 636 (Tenn. Crim. App. Sept. 25, 2020).

Evidence was sufficient to convict defendant of attempted rape of a child because defendant sent text messages to the nine-year-old victim asking when she wanted to have sex with him; a detective began posing as the victim; defendant messaged the victim to meet him at a specific location; when defendant arrived at the meeting location and was arrested, he had a tube of petroleum jelly, a condom, and an inflatable mattress in his car; and the State was only required to prove that defendant believed he was going to have sex with a child under the age of 13. *State v. Holbrooks*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 674 (Tenn. Crim. App. Oct. 14, 2020).

9. Instructions.

Although defendant complained that the instructions regarding unlawful sexual penetration were misleading, he did not support his argument with citation to any authority that would indicate that the instructions given were

incorrect; the definitions were a correct statement of the law and defendant could not be heard to complain. *State v. Morales*, — S.W.3d —, 2012 Tenn. Crim. App. LEXIS 1103 (Tenn. Crim. App. Aug. 29, 2012).

39-13-502. Aggravated rape.**NOTES TO DECISIONS****ANALYSIS**

8. Evidence.
10. —Sufficient.

8. Evidence.**10. —Sufficient.**

Sufficient evidence supported the aggravated rape conviction as defendant's DNA was found

on swabs taken from the victim's vaginal and anal areas and the victim testified she never had consensual sex with defendant. *State v. Boyd*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 745 (Tenn. Crim. App. Nov. 19, 2020).

39-13-503. Rape.**NOTES TO DECISIONS****ANALYSIS**

7. Sufficiency of Evidence.
8. Sentencing.

7. Sufficiency of Evidence.

Evidence that defendant, the victim's father, took the victim to a hotel and left and returned pushed the victim's face-down onto the bed and forcibly raped her, along with the fact that a rape kit revealed defendant's sperm on the victim's vaginal swabs was sufficient to support defendant's conviction for rape and incest. *State v. Rudd*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 539 (Tenn. Crim. App. July 31, 2020).

Evidence was sufficient to convict defendant of rape as defendant had parental authority over the victim as he raised the victim from the time she was three years old; the victim agreed that she was not close with her father and that she viewed defendant as a second father; defendant abused his parental authority - a position of extraordinary trust - and began to groom the victim to become a sexual partner at the age of 11, if not earlier; and defendant engaged in extreme emotional manipulation to convince the victim that she was in a healthy dating relationship, when in fact she was abused and controlled by defendant such that she felt her home to be a prison. *State v. Mason*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 582 (Tenn. Crim. App. Aug. 25, 2020).

Evidence was insufficient to support defendant's rape conviction because there was no

evidence of force or coercion, as the victim recanted her allegation at trial, defendant's confession included no details that could be construed as force or coercion, and the State was not permitted to use the victim's statements contained on a video recording as substantive evidence of defendant's guilt as it did not satisfy the requirements of Tenn. R. Evid. 803(26) and it did not seek the admission of the video. *State v. Wyse*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 687 (Tenn. Crim. App. Oct. 20, 2020).

8. Sentencing.

In a case in which defendant was convicted of aggravated sexual battery, solicitation of a minor, sexual battery by an authority figure, and 11 counts each of statutory rape by an authority figure, incest, and rape, defendant's effective sentence of 52 years' incarceration was not excessive because the trial court correctly applied the enhancement factors that defendant, the victim's stepfather, abused a position of private trust; and, although the court found that defendant's girlfriend was an emotionally troubled young lady who was taken advantage of by defendant, and that her testimony did not serve as mitigating evidence, the court did not consider her testimony against defendant as evidence supporting enhancement. *State v. Mason*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 582 (Tenn. Crim. App. Aug. 25, 2020).

Because the defendant's sentence was 10 years or less and because rape was not listed as an offense for which probation was not avail-

able, the trial court was required to consider probation as a sentencing alternative, and its failure to do so justified a remand for a new

sentencing hearing. *State v. Wyse*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 687 (Tenn. Crim. App. Oct. 20, 2020).

39-13-504. Aggravated sexual battery.

NOTES TO DECISIONS

ANALYSIS

2. Requisite Elements.
5. —Unlawful Sexual Contact.
7. Election Required.
8. Election Not Required.
11. Evidence.
12. —Sufficient.
15. Sentencing.

2. Requisite Elements.

5. —Unlawful Sexual Contact.

Kissing cannot be construed as an act of aggravated sexual battery. *McKaughan v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 21 (Tenn. Crim. App. Jan. 13, 2021).

7. Election Required.

Although the evidence was sufficient to support two convictions for aggravated sexual battery, defendant's convictions were reversed as there was not a proper election because the prosecutor's closing argument improperly stated that defendant touched the victim's breasts above her clothes during the incident involving oral penetration, and confused the incidents in which defendant touched the victim's breasts above her clothes and under her clothes; and, although the trial court instructed the jury that defendant touched the victim's breasts with his mouth, the trial evidence did not establish that defendant touched the victim's breasts with his mouth during any of the incidents. *State v. Breeden*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 627 (Tenn. Crim. App. Sept. 21, 2020).

8 Election Not Required.

Victim testified that the kissing occurred prior to the date of the aggravated sexual battery as stated in the indictment, and State repeatedly mentioned the date of the offense and emphasized that the charges related to the allegations of fondling the victim underneath the blanket, such that no election of offenses was necessary; thus, counsel was not deficient for failing to ask for an election and petitioner was not entitled to post-conviction relief. *McKaughan v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 21 (Tenn. Crim. App. Jan. 13, 2021).

11. Evidence.

12. —Sufficient.

Evidence was sufficient to support defendant's convictions of three counts of rape of a child, one count of aggravated sexual battery, and one count of aggravated burglary; the victim testified that a man she did not know came into her room and forced her to perform various sexual acts and DNA testing established beyond a reasonable doubt that defendant was the perpetrator. Furthermore, victim's mother testified that a screen was missing from her front window and defendant did not have permission to enter the home. *State v. Morales*, — S.W.3d —, 2012 Tenn. Crim. App. LEXIS 1103 (Tenn. Crim. App. Aug. 29, 2012).

Evidence was sufficient to convict defendant of aggravated sexual battery because the victim stated that the shower game and the kissing occurred before she turned 13; and, although the victim stated that she was 12 or 13 when the kissing and sexual touching began, relative to the incident elected for Count 1, the victim specifically stated that it happened when she was in sixth grade, meaning that she was between 11 and 12 years old. *State v. Mason*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 582 (Tenn. Crim. App. Aug. 25, 2020).

Convictions for aggravated sexual battery and rape of a child were supported by sufficient evidence, including evidence that defendant began sexually abusing the victim when she was six or seven, continued the abuse of some years, the abuse included instances where defendant penetrated the victim vaginally and forced her to perform fellatio, and the victim suffered from chlamydia and a torn hymen. *State v. Terrell*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 614 (Tenn. Crim. App. Sept. 17, 2020).

Evidence was sufficient to convict defendant of two counts of aggravated sexual battery because, during the first incident, defendant held up her legs, touched her breasts below her shirt, and ejaculated; and, during the second incident, defendant held up her legs, touched her breasts above her clothes, and ejaculated. *State v. Breeden*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 627 (Tenn. Crim. App. Sept. 21, 2020).

Evidence was sufficient to support defendant's conviction of aggravated sexual battery;

while the seven-year-old victim was alone taking a bath, defendant entered the bathroom and touched her genital area, and at the time the victim's mother was out of the house and her godmother was listening to music and unable to hear activity in the bathroom. A jury could have reasonably construed the touching as being for the purpose of sexual arousal or gratification. *State v. Gardner*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 636 (Tenn. Crim. App. Sept. 25, 2020).

There was sufficient evidence to support defendant's convictions for rape of a child and aggravated sexual battery, as the proof at trial revealed the victim woke up and was partially undressed and lying on her stomach with her knees bent and her waist in the air, defendant then put his mouth on the victim's private part, and the abuse occurred when the victim was twelve years old. *State v. Phillips*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 746 (Tenn. Crim. App. Nov. 20, 2020).

Victim's testimony that defendant put her to bed and then came back into the room and put his finger over her clothes on her "pie, pie" or vagina, and returned throughout the night and continued to touch her vagina approximately three or four more times and touched her buttocks once was sufficient to support defendant's conviction for aggravate sexual battery. *State v. Weatherly*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 772 (Tenn. Crim. App. Nov. 30, 2020).

Evidence was sufficient to support defendant's convictions of one count of rape of a child and two counts of aggravated sexual battery; the minor victims testified about three incidents of sexual abuse during visits to defendant's house so they could play with his daughter, and the jury accredited the victims' testimony, finding that defendant had unlawful sexual contact with one victim's vaginal area, that he penetrated her vaginal area, and that he had unlawful sexual contact with the other victim's vaginal area. *State v. Chaves-Abrego*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 5 (Tenn. Crim. App. Jan. 6, 2021).

Evidence was sufficient to convict defendant of solicitation of aggravated sexual battery because the victim said that on one occasion when they were at the dead end of a street that defendant asked the victim to touch his penis with her hand, but she refused; and the location of the offense was not necessary for the jury to render a unanimous verdict given that the victim testified about only one incident when defendant requested she touch his penis to make him ejaculate. *State v. Tomlin*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 145 (Tenn. Crim. App. Apr. 13, 2021).

Evidence was insufficient to convict defendant of rape of a child as to count 7 as the victim made no allegations of penetration; however, the proof was sufficient to establish that defendant committed the lesser-included offense of

aggravated sexual battery as the victim said that defendant touched her with his fingers, and that he also penetrated her with his penis, inferring that the area defendant touched was her genital area. *State v. Tomlin*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 145 (Tenn. Crim. App. Apr. 13, 2021).

Evidence was sufficient to convict defendant of aggravated sexual battery in counts 9 and 10 because the victim testified that defendant had his hands on her breasts and the stepgrandmother's testimony confirmed that she had seen defendant standing behind the victim with his hands on her breasts; and, on another occasion, defendant slipped his hand inside the waistband of her pants, and touched the victim's vagina. *State v. Tomlin*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 145 (Tenn. Crim. App. Apr. 13, 2021).

Evidence was sufficient to support defendant's conviction for aggravated sexual battery, as he approached the victim, told the victim to bend down, and then placed his penis on the victim's lips for approximately five seconds; the victim's testimony did not need to be corroborated, she provided a consistent description of defendant's actions, and an officer explained it was unnecessary to conduct a physical examination of the victim or the crime scene based on the allegations. *State v. Myers*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 150 (Tenn. Crim. App. Apr. 14, 2021).

15. Sentencing.

Record supported the imposition of consecutive sentences on the basis of defendant's being convicted of three child rapes and one aggravated sexual battery against the same minor victim. *State v. Morales*, — S.W.3d —, 2012 Tenn. Crim. App. LEXIS 1103 (Tenn. Crim. App. Aug. 29, 2012).

In a case in which defendant was convicted of aggravated sexual battery, solicitation of a minor, sexual battery by an authority figure, and 11 counts each of statutory rape by an authority figure, incest, and rape, defendant's effective sentence of 52 years' incarceration was not excessive because the trial court correctly applied the enhancement factors that defendant, the victim's stepfather, abused a position of private trust; and, although the court found that defendant's girlfriend was an emotionally troubled young lady who was taken advantage of by defendant, and that her testimony did not serve as mitigating evidence, the court did not consider her testimony against defendant as evidence supporting enhancement. *State v. Mason*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 582 (Tenn. Crim. App. Aug. 25, 2020).

Regarding's defendant's sentences for rape and aggravated sexual battery, enhancement factor (14) applied because defendant occupied a position of private trust with the victims; although the trial court made no findings rela-

tive to defendant's being in a position of private trust with the victims, the record demonstrated that the victims were friends with defendant's children and that they regularly visited and had overnight stays with his children. *State v. Chaves-Abrego*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 5 (Tenn. Crim. App. Jan. 6, 2021).

Enhancement factors applied to defendant's sentences for rape and aggravated sexual battery, and the trial court imposed a sentence of 30 years, just five years above the minimum punishment for rape, and 10 years, just two years above the minimum punishment for aggravated sexual battery; despite one aggravating factor not applying to the aggravated sexual battery conviction, given the other applicable factors, no abuse of discretion was found. *State v. Chaves-Abrego*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 5 (Tenn. Crim. App. Jan. 6, 2021).

Trial court misapplied enhancement factor (7), that the offense involved a victim and was committed to gratify the defendant's desire for pleasure or excitement, to defendant's sentences for aggravated sexual battery, as the

state supreme court has held that sexual battery necessarily includes the intent to gratify a desire for pleasure or excitement. *State v. Chaves-Abrego*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 5 (Tenn. Crim. App. Jan. 6, 2021).

Trial court did not err in ordering defendant to serve his 10-year sentence for aggravated sexual battery of one victim concurrently with his 30-year sentence for rape of a child, but that he serve his 10-year sentence for aggravated sexual battery of the other child consecutive to the 30-year sentence, for a total 40-year sentence; he used his own daughter to gain access to the victims, he did not contest that the physical and mental damage to the victims was an aggravating circumstance, and he had prior convictions for sexual offenses involving children. *State v. Chaves-Abrego*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 5 (Tenn. Crim. App. Jan. 6, 2021).

Attempted aggravated sexual battery is a Class C felony and attempted sexual battery is a Class A misdemeanor. *McKaughan v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 21 (Tenn. Crim. App. Jan. 13, 2021).

39-13-505. Sexual battery.

NOTES TO DECISIONS

6. Sentencing.

Attempted aggravated sexual battery is a Class C felony and attempted sexual battery is

a Class A misdemeanor. *McKaughan v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 21 (Tenn. Crim. App. Jan. 13, 2021).

39-13-506. Mitigated statutory rape — Statutory rape — Aggravated statutory rape.

NOTES TO DECISIONS

ANALYSIS

- 3. Attempted Statutory Rape.
- 7. Sex Offender Registration.

3. Attempted Statutory Rape.

Trial court properly convicted defendant, via a jury verdict, of attempted aggravated statutory rape because after hearing the victim use the word “suck,” defendant removed his pants, repeatedly asked her to perform oral sex while touching himself, and only stopped after the victim refused to comply with his requests, and the fact that defendant eventually gave up and went to bed did not insulate him from having committed a “substantial step.” *State v. Wheeler*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 153 (Tenn. Crim. App. Apr. 15, 2021).

7. Sex Offender Registration.

After a trial court denied judicial diversion when defendant entered a best interest plea to statutory rape, although the court did not repeat or emphasize its findings as to the offense in the context of its sex offender registry determination, the court did not abuse its discretion in requiring defendant to register as a sex offender because the court considered the relevant factors and made findings in support of its decision regarding the denial of judicial diversion and the record was sufficient to support the decision as to registration. *State v. Rankins*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 589 (Tenn. Crim. App. Sept. 1, 2020).

39-13-522. Rape of a child.**NOTES TO DECISIONS****ANALYSIS**

- 4. Election Required.
- 5. Election Not Required.
- 8. Evidence.
- 9. —Sufficient.
- 9.5. —Insufficient.
- 13. Sentence.

4. Election Required.

Although the State's failure to elect the offenses for which rape of a child convictions were sought and the trial court's failure to provide an instruction consistent with an election resulted in error, the error was harmless beyond a reasonable doubt because the prosecutor's closing argument effectively elected the specific incidents for which the State sought each conviction. *State v. Breeden*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 627 (Tenn. Crim. App. Sept. 21, 2020).

5. Election Not Required.

Failure to make an election on the rape of a child charge was harmless beyond a reasonable doubt because the victim provided detailed testimony about only one incident of penetration during the timeframe of Count One; and the victim's testimony with regard to the rape that occurred on September 2010 was sufficiently specific and detailed with regard to time, place, and method that there was no reasonable likelihood that some of the jurors might have convicted defendant based on her vague and generalized assertions that it happened on other, unspecified occasions. *State v. Fields*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 578 (Tenn. Crim. App. Aug. 25, 2020).

8. Evidence.**9. —Sufficient.**

Evidence was sufficient to support defendant's convictions of three counts of rape of a child, one count of aggravated sexual battery, and one count of aggravated burglary; the victim testified that a man she did not know came into her room and forced her to perform various sexual acts and DNA testing established beyond a reasonable doubt that defendant was the perpetrator. Furthermore, victim's mother testified that a screen was missing from her front window and defendant did not have permission to enter the home. *State v. Morales*, — S.W.3d —, 2012 Tenn. Crim. App. LEXIS 1103 (Tenn. Crim. App. Aug. 29, 2012).

Evidence was sufficient to convict defendant of rape of a child because, one night in September 2010, defendant pulled the victim onto his

lap, pulled out his sexual organ, and asked the victim to play with it; defendant penetrated the victim's private parts with his sexual organ; and the victim was 12 years old at the time. *State v. Fields*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 578 (Tenn. Crim. App. Aug. 25, 2020).

Convictions for aggravated sexual battery and rape of a child were supported by sufficient evidence, including evidence that defendant began sexually abusing the victim when she was six or seven, continued the abuse of some years, the abuse included instances where defendant penetrated the victim vaginally and forced her to perform fellatio, and the victim suffered from chlamydia and a torn hymen. *State v. Terrell*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 614 (Tenn. Crim. App. Sept. 17, 2020).

Evidence was sufficient to convict defendant of three counts of rape of a child because, as to the first incident, defendant rubbed his sexual organ on her privates, he unsuccessfully attempted to insert his sexual organ into her privates, and she described pain every time that he tried, from which the jury could have reasonably inferred that penetration, however slight, occurred; as to the second incident, defendant rubbed his sexual organ on her privates and attempted to insert his sexual organ into her privates, and the victim described pain during the incident; and, as to the third incident, defendant pushed the victim's head down, and had her place her mouth on his sexual organ. *State v. Breeden*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 627 (Tenn. Crim. App. Sept. 21, 2020).

Evidence was sufficient to convict defendant of attempted rape of a child because defendant sent text messages to the nine-year-old victim asking when she wanted to have sex with him; a detective began posing as the victim; defendant messaged the victim to meet him at a specific location; when defendant arrived at the meeting location and was arrested, he had a tube of petroleum jelly, a condom, and an inflatable mattress in his car; and the State was only required to prove that defendant believed he was going to have sex with a child under the age of 13. *State v. Holbrooks*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 674 (Tenn. Crim. App. Oct. 14, 2020).

Victim's testimony that when the victim was eight years old the mother took the victim to his grandmother's house, defendant was there and came into the victim's room, immobilized him, pulled down his parent, and forced his private part into the victim's anus was sufficient to support defendant's conviction for rape of a

child. Contrary to defendant's claim, the date of the offense was not an element of the offense. *State v. Golden*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 692 (Tenn. Crim. App. Oct. 23, 2020).

Two victims provided similar accounts to a sexual assault nurse examiner, whose physical examinations revealed mild redness in the first victim's genital area and severe redness throughout the second victim's genital area. Inasmuch as this was sufficient evidence from which the jury could find beyond a reasonable doubt that defendant sexually penetrated each victim, the evidence, viewed in the light most favorable to the State, was sufficient to sustain defendant's child rape and incest convictions. *State v. Henson*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 697 (Tenn. Crim. App. Oct. 28, 2020).

There was sufficient evidence to support defendant's convictions for rape of a child and aggravated sexual battery, as the proof at trial revealed the victim woke up and was partially undressed and lying on her stomach with her knees bent and her waist in the air, defendant then put his mouth on the victim's private part, and the abuse occurred when the victim was twelve years old. *State v. Phillips*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 746 (Tenn. Crim. App. Nov. 20, 2020).

Evidence was sufficient to support defendant's convictions of one count of rape of a child and two counts of aggravated sexual battery; the minor victims testified about three incidents of sexual abuse during visits to defendant's house so they could play with his daughter, and the jury accredited the victims' testimony, finding that defendant had unlawful sexual contact with one victim's vaginal area, that he penetrated her vaginal area, and that he had unlawful sexual contact with the other victim's vaginal area. *State v. Chaves-Abrego*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 5 (Tenn. Crim. App. Jan. 6, 2021).

Evidence that the victim awoke to defendant with his mouth on the victim's penis was sufficient to support defendant's conviction for rape of a child despite the fact that the victim never attempted to leave when defendant had placed the victim's hand on defendant's penis and had not reported the incident for over a year. *State v. King*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 56 (Tenn. Crim. App. Feb. 22, 2021).

There was sufficient evidence to sustain defendant's convictions for attempted rape of a child and attempted incest, including the victim's testimony, defendant's mother's observation of what she perceived as inappropriate physical contact between defendant and the victim, and numerous texts sent by defendant to the victim that could be construed as sexually suggestive in nature. *State v. Dennis*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 125 (Tenn. Crim. App. Mar. 31, 2021).

Evidence was sufficient to convict defendant of solicitation of rape of a child as defendant asked the victim to perform oral sex on him while they were parked at the dead end of a street, but she refused. *State v. Tomlin*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 145 (Tenn. Crim. App. Apr. 13, 2021).

Evidence was sufficient to convict defendant of rape of a child for counts 1-6 and 8 because defendant penetrated the victim's vagina with his hands, fingers, or his penis. *State v. Tomlin*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 145 (Tenn. Crim. App. Apr. 13, 2021).

9.5. —Insufficient.

Evidence was insufficient to convict defendant of rape of a child as to count 7 as the victim made no allegations of penetration; however, the proof was sufficient to establish that defendant committed the lesser-included offense of aggravated sexual battery as the victim said that defendant touched her with his fingers, and that he also penetrated her with his penis, inferring that the area defendant touched was her genital area. *State v. Tomlin*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 145 (Tenn. Crim. App. Apr. 13, 2021).

13. Sentence.

Record supported the imposition of consecutive sentences on the basis of defendant's being convicted of three child rapes and one aggravated sexual battery against the same minor victim. *State v. Morales*, — S.W.3d —, 2012 Tenn. Crim. App. LEXIS 1103 (Tenn. Crim. App. Aug. 29, 2012).

Because defendant was a Range I offender, and the rape of a child offense occurred before January 1, 2012, under a former version of this statute, the minimum statutory sentence of 25 years for defendant was also the maximum possible sentence, and the trial court erred in imposing a Range II sentence of 28 years. *State v. Fields*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 578 (Tenn. Crim. App. Aug. 25, 2020).

Trial court did not abuse its discretion by imposing consecutive sentencing because defendant committed two or more offenses involving sexual abuse of a minor during a two-day period; and the victim stated that she had been emotionally scarred and that the abuse destroyed her life and mental health. *State v. Breeden*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 627 (Tenn. Crim. App. Sept. 21, 2020).

Regarding defendant's sentences for rape and aggravated sexual battery, enhancement factor (14) applied because defendant occupied a position of private trust with the victims; although the trial court made no findings relative to defendant's being in a position of private trust with the victims, the record demonstrated that the victims were friends with defendant's children and that they regularly visited and had overnight stays with his children. *State v.*

Chaves-Abrego, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 5 (Tenn. Crim. App. Jan. 6, 2021).

Trial court did not err in ordering defendant to serve his 10-year sentence for aggravated sexual battery of one victim concurrently with his 30-year sentence for rape of a child, but that he serve his 10-year sentence for aggravated sexual battery of the other child consecutive to the 30-year sentence, for a total 40-year sentence; he used his own daughter to gain access to the victims, he did not contest that the physical and mental damage to the victims was an aggravating circumstance, and he had prior convictions for sexual offenses involving children. *State v. Chaves-Abrego*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 5 (Tenn. Crim. App. Jan. 6, 2021).

Enhancement factors applied to defendant's sentences for rape and aggravated sexual battery, and the trial court imposed a sentence of

30 years, just five years above the minimum punishment for rape, and 10 years, just two years above the minimum punishment for aggravated sexual battery; despite one aggravating factor not applying to the aggravated sexual battery conviction, given the other applicable factors, no abuse of discretion was found. *State v. Chaves-Abrego*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 5 (Tenn. Crim. App. Jan. 6, 2021).

Record supported the application of enhancement factor (7) to the rape of a child convictions because defendant promised the victim rewards and bought things for her when she complied with his sexual requests; and he bought her a provocative Halloween costume that was inappropriate for her age. *State v. Tomlin*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 145 (Tenn. Crim. App. Apr. 13, 2021).

39-13-527. Sexual battery by an authority figure.

NOTES TO DECISIONS

ANALYSIS

1. Evidence Sufficient.
2. Sentencing.

1. Evidence Sufficient.

There was sufficient evidence to support defendant's conviction for sexual battery by an authority figure, where defendant massaged the victim's breasts with his mouth and hands, made the victim touch his penis with her hands, and ejaculated onto the victim's stomach, and his DNA was found on a baby wipe the victim used to clean her stomach. *State v. Hodges*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 151 (Tenn. Crim. App. Apr. 14, 2021).

2. Sentencing.

In a case in which defendant was convicted of aggravated sexual battery, solicitation of a mi-

nor, sexual battery by an authority figure, and 11 counts each of statutory rape by an authority figure, incest, and rape, defendant's effective sentence of 52 years' incarceration was not excessive because the trial court correctly applied the enhancement factors that defendant, the victim's stepfather, abused a position of private trust; and, although the court found that defendant's girlfriend was an emotionally troubled young lady who was taken advantage of by defendant, and that her testimony did not serve as mitigating evidence, the court did not consider her testimony against defendant as evidence supporting enhancement. *State v. Mason*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 582 (Tenn. Crim. App. Aug. 25, 2020).

39-13-528. Offense of solicitation of a minor.

NOTES TO DECISIONS

ANALYSIS

1. Evidence Sufficient.
2. Attempts.
4. Sentencing.

1. Evidence Sufficient.

Evidence was sufficient to convict defendant of solicitation of a minor because, given defendant's direct request for a photograph of the victim's breasts, and the victim's role in the photography, the evidence showed that defen-

dant attempted to induce the victim to produce a lascivious exhibition of her breasts. *State v. Mason*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 582 (Tenn. Crim. App. Aug. 25, 2020).

2. Attempts.

Trial court erred in convicting defendant of attempted solicitation of a minor because the crime did not exist since the solicitation statute itself prohibited an attempt. *State v. Wheeler*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 153 (Tenn. Crim. App. Apr. 15, 2021).

4. Sentencing.

In a case in which defendant was convicted of aggravated sexual battery, solicitation of a minor, sexual battery by an authority figure, and 11 counts each of statutory rape by an authority figure, incest, and rape, defendant's effective sentence of 52 years' incarceration was not excessive because the trial court correctly applied the enhancement factors that defendant, the victim's stepfather, abused a position of

private trust; and, although the court found that defendant's girlfriend was an emotionally troubled young lady who was taken advantage of by defendant, and that her testimony did not serve as mitigating evidence, the court did not consider her testimony against defendant as evidence supporting enhancement. *State v. Mason*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 582 (Tenn. Crim. App. Aug. 25, 2020).

39-13-532. Statutory rape by an authority figure.

NOTES TO DECISIONS

2. Sentencing.

In a case in which defendant was convicted of aggravated sexual battery, solicitation of a minor, sexual battery by an authority figure, and 11 counts each of statutory rape by an authority figure, incest, and rape, defendant's effective sentence of 52 years' incarceration was not excessive because the trial court correctly applied the enhancement factors that defendant, the victim's stepfather, abused a position of

private trust; and, although the court found that defendant's girlfriend was an emotionally troubled young lady who was taken advantage of by defendant, and that her testimony did not serve as mitigating evidence, the court did not consider her testimony against defendant as evidence supporting enhancement. *State v. Mason*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 582 (Tenn. Crim. App. Aug. 25, 2020).

CHAPTER 14

OFFENSES AGAINST PROPERTY

PART 1 THEFT

39-14-103. Theft of property.

NOTES TO DECISIONS

ANALYSIS

- 9. Evidence.
- 10. —Sufficient.
- 12. Jury Instructions.
- 13. Sentencing.
- 13.5. Restitution.

9. Evidence.

10. —Sufficient.

Evidence was sufficient to establish defendant's identity as the perpetrator because the victim testified to being robbed by masked and armed men in the victim's home, a police officer saw an individual matching the description of one of the assailants, a police dog tracked the individual to where defendant came out from behind a shed and said, "I give up," a gun was found in a nearby trash can, the victim identified defendant in a show-up identification, and defendant made incriminating statements during recorded telephone calls while in jail. *State*

v. Ward, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 516 (Tenn. Crim. App. July 28, 2020).

Evidence was sufficient to support second and third defendants' convictions for aggravated robbery, theft, conspiracy, aggravated burglary, and firearms offenses, as it showed that first defendant devised a plan to conduct a home invasion and steal stuff, he enlisted others, including second and third defendants, to carry out the plan, and the group carried out the plan, which included the use of masks, gloves, and a gun to take the items from the victim's home. *State v. Morales*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 619 (Tenn. Crim. App. Sept. 18, 2020).

In the light most favorable to the State, the victim provided sufficient testimony for the jury to find that defendant stole property valued at more than \$500 but less than \$1,000. Even assuming that the value of stolen laptop computers was zero, the stated value of the remainder of the stolen property was \$835, which was consistent with the jury's finding. *State v.*

Moats, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 705 (Tenn. Crim. App. Nov. 2, 2020).

Evidence was sufficient to convict defendant of theft because, although defendant, generally, had the victim's effective consent to drive her truck during their relationship, the jury could have inferred from the surrounding facts and circumstances that defendant intended to permanently deprive the victim of the truck; and the jury could have inferred that his permissive use of the truck before he killed the victim did not extend to his continued use of her truck after he killed her. *State v. Stewart*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 714 (Tenn. Crim. App. Nov. 5, 2020).

Defendant's motion for judgment of acquittal was properly denied as the evidence was sufficient to sustain his convictions for aggravated burglary, vandalism, theft of property, and evading arrest by motor vehicle and on foot as he was the perpetrator of the offenses because the victim's front door was pried open, and a crowbar was near the door; the victim's garage door was open, and several tools from her garage were strewn on the lawn; a deputy testified that a man matching defendant's description approached the scene of the burglary, had words with the deputies, and fled in a van registered to defendant's wife; the van crashed into a ditch, and no one was present in the van; and defendant subsequently confessed to the offenses. *State v. Simmons*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 804 (Tenn. Crim. App. Dec. 22, 2020).

Evidence was sufficient to support defendant's convictions of attempted theft of property valued at \$10,000 or more but less than \$60,000 and criminal simulation because it showed that he took a check for \$13,187 to the bank and, after learning that he could not cash the check, attempted to open a bank account using the funds from the check, both the payee and the amount had been altered, and after two weeks he returned to the bank with the ATM card that had been issued to him for the purpose of accessing the funds from the check. *State v. Anderson*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 15 (Tenn. Crim. App. Jan. 12, 2021).

Evidence supported defendant's convictions of aggravated robbery, robbery, and theft because the evidence in the form of store surveillance videos, defendant's clothing, defendant's DNA, and the BB gun and money found in the car in which defendant was a passenger was sufficient to establish defendant's identity as the perpetrator who took a BB gun from a retail store without paying for it and then took cash from convenience stores by putting the clerks in fear and while brandishing the weapon at one store. *State v. Schubert*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 83 (Tenn. Crim. App. Mar. 9, 2021).

Evidence was sufficient to support defendant's theft conviction, even though the victim died before defendant drove away in the victim's truck, because at the time of his death, the victim had both possession of the truck and a beneficial interest in the truck given that he routinely used it as a means of transportation, and therefore he was the truck's owner. *State v. Helmick*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 104 (Tenn. Crim. App. Mar. 23, 2021).

Evidence of defendant's possession of the stolen gun, when considered along with his attempt to hide the gun from police, his dishonesty about having a gun in his car, his extreme nervousness even after being told he would not receive a ticket, his overzealous insistence that the gun was not stolen, and his failure to provide any proof explaining his possession of the stolen handgun, was sufficient to support his conviction for theft of property. *State v. Foster*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 114 (Tenn. Crim. App. Mar. 26, 2021).

Defendant argued that the differences in time and place between the burglary of the gun store and his possession of the stolen gun made the evidence insufficient to sustain his theft conviction; however, the jury, after being properly instructed and informed of the differences in time and location between the burglary and defendant's possession of the stolen gun, ultimately found the Defendant guilty, and the court declined defendant's request to re-weigh the evidence. *State v. Foster*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 114 (Tenn. Crim. App. Mar. 26, 2021).

Evidence was sufficient to find defendant guilty of theft of property valued under \$1,000 because defendant exercised control over a stolen gun that was found during a traffic stop of a vehicle which defendant was driving as the gun was not only propped against the driver's seat where defendant had been sitting for more than three hours but also within defendant's immediate reach. *State v. Outlaw*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 147 (Tenn. Crim. App. Apr. 13, 2021).

12. Jury Instructions.

Defendant had no objection to the trial court's instruction on the inference of unsatisfactorily explained possession of recently stolen property, nor did defendant file a motion for a new trial; consequently, defendant waived any challenge to the inference instruction itself. *State v. Foster*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 114 (Tenn. Crim. App. Mar. 26, 2021).

13. Sentencing.

Trial court did not abuse its discretion in imposing a \$500.00 fine for theft of property; the trial court conducted a full, independent assessment of the fines fixed by the jury, specifically considering defendant's ability to pay

these fines, and found that he had been employed in the past and was searching for work while living with his mother. *State v. Foster*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 114 (Tenn. Crim. App. Mar. 26, 2021).

13.5. Restitution.

After defendant pled guilty to theft of property, the trial court abused its discretion in its

restitution award because it both premised its decision upon factual findings which were unsupported by record and departed from the statutory procedure for establishing a restitution amount and payment schedule. *State v. Greene*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 728 (Tenn. Crim. App. Nov. 17, 2020).

39-14-105. Grading of theft. [Effective until July 1, 2021. See the version effective on July 1, 2021.]

NOTES TO DECISIONS

ANALYSIS

5. Evidence Sufficient for Conviction.
7. Sentencing.

5. Evidence Sufficient for Conviction.

Trial court properly sentenced defendant to seven years in the Department of Correction after a jury convicted him of felony theft of property over \$10,000 because, given defendant's confusing and hard to believe depiction of the events in his statement, the evidence showed that defendant knew what package thefts entailed, the trial court gave jury instructions regarding the proper consideration of any evidence of prior crimes defendant might have committed, and the victim qualified as "owner" within the terms of the statute where she constructively possessed the package that

was stolen from her doorstep, and the stolen items were posted for sale under defendant's social media account. *State v. Bennett*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 488 (Tenn. Crim. App. July 16, 2020).

7. Sentencing.

Inasmuch as defendant's sentencing hearing was held after the enactment of the amended theft grading statute, the trial court should have classified defendant's theft convictions in counts 3 and 4 as Class A misdemeanors. The trial court's failure to apply the amended theft grading statute at sentencing was plain error, requiring that defendant's six-year, Class E felony sentences be vacated. *State v. Moats*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 705 (Tenn. Crim. App. Nov. 2, 2020).

39-14-105. Grading of theft. [Effective on July 1, 2021. See the version effective until July 1, 2021.]

NOTES TO DECISIONS

ANALYSIS

5. Evidence Sufficient for Conviction.
7. Sentencing.

5. Evidence Sufficient for Conviction.

Trial court properly sentenced defendant to seven years in the Department of Correction after a jury convicted him of felony theft of property over \$10,000 because, given defendant's confusing and hard to believe depiction of the events in his statement, the evidence showed that defendant knew what package thefts entailed, the trial court gave jury instructions regarding the proper consideration of any evidence of prior crimes defendant might have committed, and the victim qualified as "owner" within the terms of the statute where

she constructively possessed the package that was stolen from her doorstep, and the stolen items were posted for sale under defendant's social media account. *State v. Bennett*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 488 (Tenn. Crim. App. July 16, 2020).

7. Sentencing.

Inasmuch as defendant's sentencing hearing was held after the enactment of the amended theft grading statute, the trial court should have classified defendant's theft convictions in counts 3 and 4 as Class A misdemeanors. The trial court's failure to apply the amended theft grading statute at sentencing was plain error, requiring that defendant's six-year, Class E felony sentences be vacated. *State v. Moats*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 705 (Tenn. Crim. App. Nov. 2, 2020).

39-14-114. Forgery.**NOTES TO DECISIONS****3. Evidence Sufficient.**

In a case involving five defendants who were convicted of forgery and fraudulent filing of a lien, the evidence was sufficient to support the convictions for forgery regarding one of the defendants. The proof at trial indicated that this defendant's name appeared on multiple

UCC financing statements filed electronically with the Secretary of State's office, each one alleging that the defendant was owed millions of dollars in collateral against the individuals specified in the documents. *State v. Lyons*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 100 (Tenn. Crim. App. Mar. 22, 2021).

39-14-115. Criminal simulation.**NOTES TO DECISIONS****2. Sufficiency of Evidence.**

Evidence was sufficient to support defendant's convictions of attempted theft of property valued at \$10,000 or more but less than \$60,000 and criminal simulation because it showed that he took a check for \$13,187 to the bank and, after learning that he could not cash the check, attempted to open a bank account

using the funds from the check, both the payee and the amount had been altered, and after two weeks he returned to the bank with the ATM card that had been issued to him for the purpose of accessing the funds from the check. *State v. Anderson*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 15 (Tenn. Crim. App. Jan. 12, 2021).

39-14-146. Theft of property — Conduct involving merchandise.**NOTES TO DECISIONS****2. Evidence Sufficient.**

Evidence supported defendant's conviction for theft because video surveillance showed someone in clothing similar to defendant's entering and exiting the victim's apartment, a gray beanie with defendant's DNA and a boot print matching defendant's boot were found nearby, the victim's computer and a knife from

the apartment were found along the path taken by defendant, defendant pawned a ring from the apartment, defendant's cell phone was used to search for information about a stabbing, and defendant confessed the crime to a jail inmate. *State v. McLawhorn*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 686 (Tenn. Crim. App. Oct. 20, 2020).

PART 2 ANIMALS**39-14-211. Examination of livestock by commissioner of agriculture or other persons.****NOTES TO DECISIONS****ANALYSIS**

1. Construction.
2. Qualifications.

1. Construction.

Assertion that the statute is ambiguous due to the syntax of the phrase "graduate of an accredited college of agriculture with a specialty in livestock" is not well-taken. By continuing to the next sentence, it is evident that the graduate of the agricultural college is required to have a specialization in livestock

instead of the college's being specialized in livestock. *State v. Sullivan*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 101 (Tenn. Crim. App. Mar. 22, 2021).

As to the argument that an officer's two-year degree in equine studies from a community college did not satisfy statutory requirements, the statute only specifies that the examiner (1) be a graduate (2) of an accredited college of agriculture (3) and the graduate specializes in livestock practice; the statute does not restrict livestock examiners to those possessing four-year degrees and nowhere does the statute ex-

clude community colleges or specify what type of accreditation is required. *State v. Sullivan*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 101 (Tenn. Crim. App. Mar. 22, 2021).

The court disagrees with the assertion that the statute only applies to warrantless searches, as the legislature included no limiting language to that effect; in effect, the legislature has enacted an enhanced probable cause standard in regard to livestock owners accused of animal cruelty and related offenses. The trial court erred by concluding that an otherwise properly issued search warrant would render issues of compliance with the statute moot. *State v. Sullivan*, — S.W.3d —, 2021 Tenn.

Crim. App. LEXIS 101 (Tenn. Crim. App. Mar. 22, 2021).

2. Qualifications.

Laramie County Community College was regionally accredited and offered agriculture degrees with a specialization in equine science, and an officer obtained an associate's degree in equine studies, which included the coursework needed to perform body scoring and determine when a horse was starving; thus, the officer was qualified to perform a probable cause determination in this case pursuant to the statutory language. *State v. Sullivan*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 101 (Tenn. Crim. App. Mar. 22, 2021).

PART 4 BURGLARY AND RELATED OFFENSES

39-14-402. Burglary.

NOTES TO DECISIONS

11. Evidence Sufficient.

Evidence was sufficient to establish defendant's identity as the perpetrator because the victim testified to being robbed by masked and armed men in the victim's home, a police officer saw an individual matching the description of one of the assailants, a police dog tracked the individual to where defendant came out from behind a shed and said, "I give up," a gun was found in a nearby trash can, the victim identified defendant in a show-up identification, and defendant made incriminating statements during recorded telephone calls while in jail. *State v. Ward*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 516 (Tenn. Crim. App. July 28, 2020).

Evidence supported defendant's conviction for aggravated burglary because the victim and defendant's accomplice testified that the accomplice came to the victim's house to meet with the victim to engage in sexual activity and that defendant entered the victim's house without permission, fired a gun, and took property from

the victim by placing the victim in fear for the victim's safety. *State v. Rogers*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 747 (Tenn. Crim. App. Nov. 20, 2020).

Circuit court properly denied defendant's motion for new trial because a rational jury could have found beyond a reasonable doubt that defendant entered a house without consent and with the intent to commit theft the evidence was sufficient to support his aggravated burglary conviction where the owner did not know defendant or give him permission to be in his house, the house was in disarray, a television was taken off the wall and was lying on the floor of his kitchen near the open back door, officers observed three men run through the backyard and jump the fence, two were apprehended, the third continued to flee, defendant was observed nearby and attempted to hide from an officer. *State v. Whitelow*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 12 (Tenn. Crim. App. Jan. 8, 2021).

39-14-403. Aggravated burglary.

NOTES TO DECISIONS

4. Evidence Sufficient.

Evidence was sufficient to support defendant's convictions of three counts of rape of a child, one count of aggravated sexual battery, and one count of aggravated burglary; the victim testified that a man she did not know came into her room and forced her to perform various sexual acts and DNA testing established beyond a reasonable doubt that defendant was the perpetrator. Furthermore, victim's mother testified that a screen was missing from her

front window and defendant did not have permission to enter the home. *State v. Morales*, — S.W.3d —, 2012 Tenn. Crim. App. LEXIS 1103 (Tenn. Crim. App. Aug. 29, 2012).

Evidence was sufficient to establish defendant's identity as the perpetrator because the victim testified to being robbed by masked and armed men in the victim's home, a police officer saw an individual matching the description of one of the assailants, a police dog tracked the individual to where defendant came out from

behind a shed and said, "I give up," a gun was found in a nearby trash can, the victim identified defendant in a show-up identification, and defendant made incriminating statements during recorded telephone calls while in jail. *State v. Ward*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 516 (Tenn. Crim. App. July 28, 2020).

Evidence was sufficient to support second and third defendants' convictions for aggravated robbery, theft, conspiracy, aggravated burglary, and firearms offenses, as it showed that first defendant devised a plan to conduct a home invasion and steal stuff, he enlisted others, including second and third defendants, to carry out the plan, and the group carried out the plan, which included the use of masks, gloves, and a gun to take the items from the victim's home. *State v. Morales*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 619 (Tenn. Crim. App. Sept. 18, 2020).

Evidence was sufficient to convict defendant of two counts of aggravated burglary because defendant forced his way into the second victim's house on April 13, 2018, by kicking in the back door; once inside, he took a jewelry box; after defendant was apprehended at the scene of that burglary, the authorities discovered he possessed coins and gift cards taken in an April 10, 2018 burglary of the first victim's house; the first victim identified the coins and gift cards as hers; defendant admitted in pretrial statements to the police that he committed both offense; and the jury chose to credit the State's proof over defendant's claims that he had not committed the offenses and that a detective had testified untruthfully. *State v. Eaker*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 657 (Tenn. Crim. App. Oct. 7, 2020).

Evidence supported defendant's conviction for aggravated burglary because the victim and defendant's accomplice testified that the accomplice came to the victim's house to meet with the victim to engage in sexual activity and that

defendant entered the victim's house without permission, fired a gun, and took property from the victim by placing the victim in fear for the victim's safety. *State v. Rogers*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 747 (Tenn. Crim. App. Nov. 20, 2020).

Defendant's motion for judgment of acquittal was properly denied as the evidence was sufficient to sustain his convictions for aggravated burglary, vandalism, theft of property, and evading arrest by motor vehicle and on foot as he was the perpetrator of the offenses because the victim's front door was pried open, and a crowbar was near the door; the victim's garage door was open, and several tools from her garage were strewn on the lawn; a deputy testified that a man matching defendant's description approached the scene of the burglary, had words with the deputies, and fled in a van registered to defendant's wife; the van crashed into a ditch, and no one was present in the van; and defendant subsequently confessed to the offenses. *State v. Simmons*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 804 (Tenn. Crim. App. Dec. 22, 2020).

Circuit court properly denied defendant's motion for new trial because a rational jury could have found beyond a reasonable doubt that defendant entered a house without consent and with the intent to commit theft the evidence was sufficient to support his aggravated burglary conviction where the owner did not know defendant or give him permission to be in his house, the house was in disarray, a television was taken off the wall and was lying on the floor of his kitchen near the open back door, officers observed three men run through the backyard and jump the fence, two were apprehended, the third continued to flee, defendant was observed nearby and attempted to hide from an officer. *State v. Whitelow*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 12 (Tenn. Crim. App. Jan. 8, 2021).

39-14-404. Especially aggravated burglary.

NOTES TO DECISIONS

4. Evidence Sufficient.

Evidence supported defendant's burglary conviction because video surveillance showed someone in clothing similar to defendant's entering and exiting the victim's apartment, a gray beanie with defendant's DNA and a boot print matching defendant's boot were found nearby, the victim's computer and a knife from

the apartment were found along the path taken by defendant, defendant pawned a ring from the apartment, defendant's cell phone was used to search for information about a stabbing, and defendant confessed the crime to a jail inmate. *State v. McLawhorn*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 686 (Tenn. Crim. App. Oct. 20, 2020).

39-14-408. Vandalism.**NOTES TO DECISIONS****1. Evidence Sufficient.**

Defendant's motion for judgment of acquittal was properly denied as the evidence was sufficient to sustain his convictions for aggravated burglary, vandalism, theft of property, and evading arrest by motor vehicle and on foot as he was the perpetrator of the offenses because the victim's front door was pried open, and a crowbar was near the door; the victim's garage door was open, and several tools from her

garage were strewn on the lawn; a deputy testified that a man matching defendant's description approached the scene of the burglary, had words with the deputies, and fled in a van registered to defendant's wife; the van crashed into a ditch, and no one was present in the van; and defendant subsequently confessed to the offenses. *State v. Simmons*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 804 (Tenn. Crim. App. Dec. 22, 2020).

PART 9 MONEY LAUNDERING OFFENSES**39-14-903. Criminal penalties.****NOTES TO DECISIONS****ANALYSIS**

1. Constitutionality.
- 1.5. Double Jeopardy.
3. Evidence Sufficient.
4. Evidence Insufficient.

1. Constitutionality.

Statute was not unconstitutionally vague as defendant had fair warning that using illegal proceeds to promote further criminal activity violated the money laundering statute because the common understanding of the phrase "carrying on" plainly encompassed defendant's conduct as to his money laundering conviction as he previously had delivered marijuana to the confidential informant (CI) with an expectation that she would sell the product and pay him with proceeds from the sales; he later received cash payment with a stated intent to purchase more marijuana, which he would then sell to the CI for her to re-sell to customers; and he then, in fact, did purchase more marijuana, a portion of which he delivered to the CI for her to re-sell. *State v. Allison*, — S.W.3d —, 2021 Tenn. LEXIS 3 (Tenn. Jan. 14, 2021).

1.5. Double Jeopardy.

Because the Money Laundering Act of 1996 specifically directed that money laundering offenses should be separately punished from any related specified unlawful activity, the General Assembly's intent to permit multiple punishments was clear; thus, defendant's conviction of both offenses - the January 9 delivery of marijuana and the January 13 promotional money laundering - did not violate double jeopardy protections. *State v. Allison*, — S.W.3d —, 2021 Tenn. LEXIS 3 (Tenn. Jan. 14, 2021).

3. Evidence Sufficient.

Evidence was sufficient to convict defendant of the first count of money laundering because the proof showed that defendant knowingly conducted a financial transaction or made other disposition within the meaning of the Money Laundering Act of 1996, that the transaction or other disposition involved proceeds represented to him to have been derived from the sale of multiple pounds of marijuana, and that he did so with the intent to promote the carrying on of the sale of multiple pounds of marijuana; and a rational juror could infer that the cash received by defendant on January 13 had been used by defendant to obtain the marijuana he delivered to the confidential informant on January 16. *State v. Allison*, — S.W.3d —, 2021 Tenn. LEXIS 3 (Tenn. Jan. 14, 2021).

4. Evidence Insufficient.

Evidence was insufficient to convict defendant of the second money laundering offense because the Money Laundering Act of 1996 required proof that defendant conducted a financial transaction or made other disposition involving proceeds represented to him to have been derived from the sale of marijuana, and those proceeds were comprised of the \$3,000 defendant received from the confidential informant (CI) on January 20, but the proof showed that defendant was still in possession of \$2,480 of those funds when he was arrested on January 21, and that he did not use the missing \$520 to pay for the marijuana discovered on January 21. *State v. Allison*, — S.W.3d —, 2021 Tenn. LEXIS 3 (Tenn. Jan. 14, 2021).

In the context of the offense of promotional money laundering, defendant's mere receipt of payment for fronted drugs, standing alone, was not sufficient to establish the element of con-

ducting a financial transaction or making other disposition involving proceeds represented to defendant to have been derived from the sale of

marijuana. *State v. Allison*, — S.W.3d —, 2021 Tenn. LEXIS 3 (Tenn. Jan. 14, 2021).

CHAPTER 15

OFFENSES AGAINST THE FAMILY

PART 3 BIGAMY AND INCEST

39-15-302. Incest.

NOTES TO DECISIONS

ANALYSIS

7. Evidence Sufficient.
8. Sentence.

7. Evidence Sufficient.

Evidence that defendant, the victim's father, took the victim to a hotel and left and returned pushed the victim's face-down onto the bed and forcibly raped her, along with the fact that a rape kit revealed defendant's sperm on the victim's vaginal swabs was sufficient to support defendant's conviction for rape and incest. *State v. Rudd*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 539 (Tenn. Crim. App. July 31, 2020).

Evidence was sufficient to support defendant's conviction of incest because it established that the victim reported to her school counselor that defendant, her father, had raped her before school on October 19, 2016, the victim acknowledged that she repeated this claim to a detective, hospital personnel, a forensic interviewer, the prosecutor, and the victim-witness coordinator, when questioned by the police defendant confessed having engaged in sexual intercourse with the victim, and forensic testing established that defendant's semen was present on the external vaginal swabs taken during the victim's examination at the hospital on October 19, 2016. *State v. Wyse*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 687 (Tenn. Crim. App. Oct. 20, 2020).

Two victims provided similar accounts to a sexual assault nurse examiner, whose physical examinations revealed mild redness in the first victim's genital area and severe redness throughout the second victim's genital area. Inasmuch as this was sufficient evidence from

which the jury could find beyond a reasonable doubt that defendant sexually penetrated each victim, the evidence, viewed in the light most favorable to the State, was sufficient to sustain defendant's child rape and incest convictions. *State v. Henson*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 697 (Tenn. Crim. App. Oct. 28, 2020).

There was sufficient evidence to sustain defendant's convictions for attempted rape of a child and attempted incest, including the victim's testimony, defendant's mother's observation of what she perceived as inappropriate physical contact between defendant and the victim, and numerous texts sent by defendant to the victim that could be construed as sexually suggestive in nature. *State v. Dennis*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 125 (Tenn. Crim. App. Mar. 31, 2021).

8. Sentence.

In a case in which defendant was convicted of aggravated sexual battery, solicitation of a minor, sexual battery by an authority figure, and 11 counts each of statutory rape by an authority figure, incest, and rape, defendant's effective sentence of 52 years' incarceration was not excessive because the trial court correctly applied the enhancement factors that defendant, the victim's stepfather, abused a position of private trust; and, although the court found that defendant's girlfriend was an emotionally troubled young lady who was taken advantage of by defendant, and that her testimony did not serve as mitigating evidence, the court did not consider her testimony against defendant as evidence supporting enhancement. *State v. Mason*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 582 (Tenn. Crim. App. Aug. 25, 2020).

PART 4 CHILDREN

39-15-401. Child abuse and child neglect or endangerment.**NOTES TO DECISIONS****ANALYSIS**

- 7. Lesser Included Offenses.
- 8. Evidence.
- 9. —Sufficient.
- 9.5. —Insufficient.
- 10. Sentencing.
- 12. Instructions.

7. Lesser Included Offenses.

Defendant's convictions for criminally negligent homicide and child neglect violated double jeopardy because they arose from the same act or transaction and the Legislature had declared child neglect a lesser-included offense of criminally negligent homicide. *State v. Bible*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 662 (Tenn. Crim. App. Oct. 8, 2020).

8. Evidence.**9. —Sufficient.**

Evidence was sufficient to support defendant's convictions of aggravated child abuse because defendant handcuffed the victims to each other in a manner that allowed the handcuffs to continually tighten on their wrists, she hit the victim in the head with a rolling pin, causing him to fall to the ground bleeding, and she deprived the victims of food to the point of malnourishment. *State v. Cox*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 584 (Tenn. Crim. App. Aug. 25, 2020).

9.5. —Insufficient.

Evidence failed to show that the victim suffered any injury as a result of defendant's conduct and thus the evidence was insufficient to support a conviction of child abuse or child neglect; the victim did not testify to experiencing any pain and the State presented no evidence of any emotional or psychological harm to the victim or of defendant's failure to act or deprivation of care for the victim. The evidence that defendant touched the victim's penis underneath his clothes satisfied the elements of a simple assault by offensive touching. *State v. Walkington*, — S.W.3d —, 2020 Tenn. Crim.

App. LEXIS 734 (Tenn. Crim. App. Nov. 19, 2020).

10. Sentencing.

Trial court did not consider a sentence of full probation to be a form of punishment, and because the trial court failed to consider the factors articulated in case law and no evidence supported a finding of the need for deterrence, the trial court erred by ordering confinement. *State v. Walkington*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 734 (Tenn. Crim. App. Nov. 19, 2020).

Trial court instructed the jury as to the elements of child neglect, a Class E felony, and that was the charge for which the jury rendered a guilty verdict; defendant's three-year sentence as a Range I offender for the Class D felony offense of child abuse was outside of the permissible range. *State v. Walkington*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 734 (Tenn. Crim. App. Nov. 19, 2020).

12. Instructions.

State did not present any evidence of any injury, harm, or deleterious effect to the victim; because the evidence presented at trial was legally insufficient to support a conviction for either child abuse or child neglect, the trial court should not have instructed the jury on either offense. *State v. Walkington*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 734 (Tenn. Crim. App. Nov. 19, 2020).

Evidence did not support an instruction for child neglect because the State did not present evidence of conduct constituting neglect by defendant; therefore, the trial court should not have instructed the jury on child abuse or child neglect as a lesser included offense of aggravated sexual battery. *State v. Walkington*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 734 (Tenn. Crim. App. Nov. 19, 2020).

Because the trial court's instruction enumerated the elements of child neglect rather than child abuse, defendant's conviction could only be for child neglect. *State v. Walkington*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 734 (Tenn. Crim. App. Nov. 19, 2020).

39-15-402. Haley's Law — Aggravated child abuse and aggravated child neglect or endangerment — Definitions.

NOTES TO DECISIONS

ANALYSIS

3. Serious Bodily Injury.
9. Evidence Sufficient.

3. Serious Bodily Injury.

Mother's act of child endangerment resulted in serious bodily injury to the child as doctors testified that the child suffered brain injuries a result of nonaccidental and abusive head trauma. In re Treylynn T., — S.W.3d —, 2020 Tenn. App. LEXIS 403 (Tenn. Ct. App. Sept. 9, 2020), rev'd, — S.W.3d —, 2020 Tenn. LEXIS 597 (Tenn. Dec. 16, 2020).

9. Evidence Sufficient.

Trial court did not err in finding that a mothers' children were dependent and neglected, when one child was a victim of aggravated child abuse by the father, because the court considered the mother's Alford plea to child endangerment in reaching its decision that the mother committed child endangerment as to the child and in concluding that the mother's act of child endangerment resulted in serious bodily injury to the child as a doctor testified that the child suffered brain injuries a result of abusive head trauma. In re Treylynn T., — S.W.3d —, 2020 Tenn. App. LEXIS 403 (Tenn. Ct. App. Sept. 9, 2020), rev'd, — S.W.3d —, 2020 Tenn. LEXIS 597 (Tenn. Dec. 16, 2020).

Evidence was sufficient to support defendant's convictions of aggravated child abuse because defendant handcuffed the victims to each other in a manner that allowed the handcuffs to continually tighten on their wrists, she hit the victim in the head with a rolling pin, causing him to fall to the ground bleeding, and she deprived the victims of food to the point of malnourishment. State v. Cox, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 584 (Tenn. Crim. App. Aug. 25, 2020).

Court of Criminal Appeals erred in affirming the trial court's grant of defendant's motion for acquittal as to the charge of aggravated child neglect because a jury could have concluded that defendant knowingly neglected the child based on medical and scientific evidence that defendant died as a result of chronic malnutrition and dehydration. State v. Weems, 619 S.W.3d 208, 2020 Tenn. LEXIS 601 (Tenn. Mar. 3, 2021).

Evidence was sufficient to support defendant's convictions of first-degree felony murder and aggravated child abuse because an expert testified that it was impossible that the victim's injuries occurred while he was a patient at the hospital, that he died within minutes to a couple of hours of receiving his injuries, and both experts testified that the injuries were non-accidental. State v. Huse, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 102 (Tenn. Crim. App. Mar. 23, 2021).

CHAPTER 16

OFFENSES AGAINST ADMINISTRATION OF GOVERNMENT

PART 2 CONTRABAND IN PENAL INSTITUTIONS

39-16-201. Introduction or possession of weapons, ammunition, explosives, intoxicants, legend drugs, or controlled substances or controlled substance analogues into penal institution.

NOTES TO DECISIONS

2. Evidence Sufficient.

Defendant's conviction for introduction of contraband into a penal facility was supported by evidence that he did not disclose he had methamphetamine hidden in his shoe, knew he was in possession of it at the time of his arrest,

knew he was being transported to jail, and had the opportunity to turn the drugs over during the booking process but did not. State v. Reed, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 645 (Tenn. Crim. App. Sept. 30, 2020).

PART 5 INTERFERENCE WITH GOVERNMENT OPERATIONS

39-16-502. False reports.

NOTES TO DECISIONS

2. Evidence Sufficient.

Reasonable jury could have found beyond a reasonable doubt that defendant knowingly or intentionally made a false police report because she admitted to giving the 911 operator a false name, she told the 911 operator that her boyfriend and a friend were doing drugs which they testified was false, defendant told 911 that

the owner of the property asked the friend to leave but at trial defendant admitted she was not there and did not know whether the boyfriend's mother had done so, and defendant claimed that she asked the friend to leave but the friend denied this. *State v. Givens*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 159 (Tenn. Crim. App. Apr. 20, 2021).

39-16-503. Tampering with or fabricating evidence.

NOTES TO DECISIONS

ANALYSIS

- 3. Indictment.
- 7. Evidence Sufficient.

3. Indictment.

Indictment was sufficient to inform defendant of the nature of the charge of tampering with the firearm he used during a shooting because the indictment informed defendant that he was accused of altering, destroying, or concealing any record, document, or thing with the intent to impair its verity, legibility, or availability as evidence in an investigation that he knew was taking place, and the indictment cited to subsection (a)(1). *State v. Manning*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 615 (Tenn. Crim. App. Sept. 17, 2020).

Trial court did not err in denying the motion for acquittal based on lack of notice because defendant never moved for a bill of particulars to determine what evidence would be the subject of the tampering with evidence charge; at trial, defense counsel explicitly stated that he were not misled into believing that a vehicle would be the subject of the tampering charge, and defense counsel conceded that he merely assumed the vehicle was the focus of the charge. *State v. Manning*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 615 (Tenn. Crim. App. Sept. 17, 2020).

7. Evidence Sufficient.

Defendant was properly convicted of first-degree murder, tampering with evidence, and setting fire to personal property because the evidence established, *inter alia*, that defendant, the accomplice, and the victim got into a car and drove to a parking lot where, after the victim and defendant exited the car, the accomplice heard a thud on the car, defendant instructed the accomplice to open the trunk, the accomplice then saw defendant take the victim out of the trunk at another location, and after instructing the accomplice to purchase some gasoline and retrieve a rag and spray bottle with bleach, defendant wiped the car down, poured gasoline in it, and set it on fire. *State v. Shuler*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 608 (Tenn. Crim. App. Sept. 15, 2020).

Evidence was sufficient to support defendant's conviction for evidence supported his conviction for tampering with the firearm he used during a shooting because the jury could have inferred that defendant was in possession of a firearm, that he concealed it somewhere to prevent police from discovering it, and that he subsequently denied his involvement with the shooting; the evidence established that defendant had a gun which he used to shoot at the victim. *State v. Manning*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 615 (Tenn. Crim. App. Sept. 17, 2020).

PART 6 OBSTRUCTION OF JUSTICE

39-16-602. Resisting stop, frisk, halt, arrest or search — Prevention or obstruction of service of legal writ or process.

NOTES TO DECISIONS

ANALYSIS

1. Sufficiency of Evidence.
2. Defense of Excessive Force.
10. Evidence.
13. —Identity.

1. Sufficiency of Evidence.

Evidence was sufficient to support defendant's conviction for resisting arrest because it showed that though defendant originally placed his hands behind his back to be cuffed, he moved his left arm forward, tensed up, and began to pull away from the officers as the officer attempted to place the cuff on defendant's other wrist. Defendant then made a lunging-type movement toward the gas pump, and ultimately the officer took defendant to the ground in order to handcuff him. *State v. Forkpa*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 724 (Tenn. Crim. App. Nov. 16, 2020).

Evidence was sufficient to support defendant's conviction for resisting arrest because according to both the eyewitness testimony and the body camera video defendant acted aggressively towards the officer from the outset of the incident. Defendant refused the officer's request to place his hands behind his back, he refused to get on the ground as ordered, and he physically resisted the officer's attempts to gain control of his arms and hands. *State v. Elliott*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 127 (Tenn. Crim. App. Mar. 31, 2021).

39-16-603. Evading arrest.

NOTES TO DECISIONS

3. Evidence Sufficient.

Defendant's motion for judgment of acquittal was properly denied as the evidence was sufficient to sustain his convictions for aggravated burglary, vandalism, theft of property, and evading arrest by motor vehicle and on foot as he was the perpetrator of the offenses because the victim's front door was pried open, and a crowbar was near the door; the victim's garage door was open, and several tools from her garage were strewn on the lawn; a deputy testified that a man matching defendant's description approached the scene of the burglary, had words with the deputies, and fled in a van registered to defendant's wife; the van crashed into a ditch, and no one was present in the van;

2. Defense of Excessive Force.

Trial court had sufficient evidence upon which to reject the Defendant's claim of self-defense because nothing in the video or the officer's testimony suggested that they used excessive force when they placed the handcuffs on defendant, and the officers' merely advising him that he was being detained and attempted to handcuff him, which did not amount to greater force than necessary to make an arrest. *State v. Forkpa*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 724 (Tenn. Crim. App. Nov. 16, 2020).

10. Evidence.**13. —Identity.**

Defendant's dual convictions for resisting arrest and disorderly conduct did not violate double jeopardy because the resisting arrest charge was based on defendant's temporary escape from the custody of a police officer who was attempting to handcuff defendant, while the disorderly conduct charge was based on the unreasonable noise created by defendant as paramedics arrived and attempted to treat defendant after a police officer tackled and hit defendant as defendant was attempting to escape. *State v. Schubert*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 83 (Tenn. Crim. App. Mar. 9, 2021).

and defendant subsequently confessed to the offenses. *State v. Simmons*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 804 (Tenn. Crim. App. Dec. 22, 2020).

Evidence was sufficient to support defendant's conviction for evading arrest because a sheriff's deputy activated the blue lights and sirens on the deputy's car and pursued defendant's motorcycle at high speeds after the deputy's radar indicated defendant was speeding, defendant had defendant's hand down beside the motorcycle and waved like defendant was acknowledging the deputy, defendant did not pull over, and defendant continued to ride the motorcycle for miles until defendant turned into a driveway and parked. *State v. Schmitz*,

— S.W.3d —, 2021 Tenn. Crim. App. LEXIS 54
(Tenn. Crim. App. Feb. 14, 2021).

PART 7 PERJURY

39-16-702. Perjury.

NOTES TO DECISIONS

ANALYSIS

1. Evidence.
2. Sentencing.

1. Evidence.

Evidence was sufficient to convict defendant of perjury because, although defendant testified that he did not know he was prohibited from living with his stepson at the time of the initial April 4 registration or the September 1 meeting, he signed an acknowledgement of the sex offender registry rules prior to those dates, on January 27, 2016; the document acknowledged by defendant recited the law effectively prohibiting him from living with his stepson;

and the jury could have found that defendant knew of his obligation to report that he lived with his stepson and that he intentionally failed to disclose that information on the tracking form to mislead officials. *State v. Sullivan*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 22 (Tenn. Crim. App. Jan. 14, 2021).

2. Sentencing.

Trial court appropriately sentenced defendant to six years of probation for perjury because it was within the statutorily authorized range permitted for Class E felonies, which was between one and six years. *State v. Sullivan*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 22 (Tenn. Crim. App. Jan. 14, 2021).

CHAPTER 17

OFFENSES AGAINST PUBLIC HEALTH, SAFETY AND WELFARE

PART 1 MISCELLANEOUS

39-17-117. Unlawful to draw a lien against real or personal property without legal basis.

NOTES TO DECISIONS

1. Evidence Sufficiency.

Defendants were not entitled to relief on the issue regarding the sufficiency of the evidence to support their convictions for fraudulently filing a lien. Viewed in the light most favorable

to the State, the proof at trial established that each of the defendants filed liens against multiple victims. *State v. Lyons*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 100 (Tenn. Crim. App. Mar. 22, 2021).

PART 3 DISORDERLY CONDUCT AND RIOTS

39-17-305. Disorderly conduct.

NOTES TO DECISIONS

needs Catchline

Defendant's dual convictions for resisting arrest and disorderly conduct did not violate double jeopardy because the resisting arrest charge was based on defendant's temporary escape from the custody of a police officer who

was attempting to handcuff defendant, while the disorderly conduct charge was based on the unreasonable noise created by defendant as paramedics arrived and attempted to treat defendant after a police officer tackled and hit defendant as defendant was attempting to es-

cape. *State v. Schubert*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 83 (Tenn. Crim. App. Mar. 9, 2021).

PART 4 DRUGS

39-17-402. Definitions for this part and title 53, chapter 11, parts 3 and 4.

NOTES TO DECISIONS

ANALYSIS

1. Drug Paraphernalia.
4. Evidence Sufficient.

1. Drug Paraphernalia.

Offense of possession of drug paraphernalia does not require that the object at issue be used in large-scale drug operations involving the packaging and repackaging of substantial amounts of drugs; the definition and examples of drug paraphernalia reference certain items directly related to the personal use of drugs. *State v. Foster*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 114 (Tenn. Crim. App. Mar. 26, 2021).

4. Evidence Sufficient.

Evidence was sufficient to support defendant's conviction of conspiracy to sell or deliver a controlled substance because it showed that a confidential informant (CI) purchased oxycodone and heroin from defendant on two occa-

sions, defendant was seen on two separate occasions getting into the CI's car and going to another man's house to purchase heroin for the CI, the drugs provided by the CI were tested and determined to be oxycodone and heroin, and the testimony at trial revealed that on two separate occasions defendant purchased heroin from another man to sell to the CI. *State v. Woods*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 667 (Tenn. Crim. App. Oct. 12, 2020).

For purposes of defendant's conviction of possession of drug paraphernalia, the record supported the jury's determination that the digital scale found in defendant's car was classifiable as drug paraphernalia; a deputy testified that digital scales were commonly used to weigh narcotics and the jury could have inferred that defendant used or intended to use the digital scale to prepare, package, or repackage a controlled substance, including the marijuana found in his car. *State v. Foster*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 114 (Tenn. Crim. App. Mar. 26, 2021).

39-17-407. Criteria for Schedule II.

NOTES TO DECISIONS

9. Double Jeopardy.

Because the Money Laundering Act of 1996 specifically directed that money laundering offenses should be separately punished from any related specified unlawful activity, the General Assembly's intent to permit multiple punish-

ments was clear; thus, defendant's conviction of both offenses - the January 9 delivery of marijuana and the January 13 promotional money laundering - did not violate double jeopardy protections. *State v. Allison*, — S.W.3d —, 2021 Tenn. LEXIS 3 (Tenn. Jan. 14, 2021).

39-17-417. Criminal offenses and penalties.

Attorney General Opinions. The proposed Tennessee Clinical Cannabis Authorization and Research Act would immunize pharmacists acting in good faith from adverse administrative actions and civil liability under state law. And, although the Cannabis Act does not immunize pharmacists from state criminal liability and does not—and could not—immunize pharma-

cists from adverse administrative and criminal consequences under federal law, pharmacists acting in good faith pursuant to the state medical cannabis program are highly unlikely to face criminal prosecution or adverse administrative action by federal officials. OAG 20-11, 2020 Tenn. AG LEXIS 28 (6/5/2020).

NOTES TO DECISIONS

ANALYSIS

- 10. Evidence.
- 11. —Sufficient.
- 12. —Insufficient.

10. Evidence.**11. —Sufficient.**

Evidence supported defendant's convictions for possession of heroin with the intent to sell and possession with the intent to deliver 0.5 gram or more of cocaine because defendant admitted to purchasing the cocaine and heroin before defendant handed the drugs to the driver of a vehicle in a traffic stop for the driver to hide the drugs. Defendant stated that the cocaine was purchased for a third party, and, based upon the amount of cocaine seized, the jury was permitted to infer that the cocaine was possessed for purpose of selling or delivery. *State v. Johnson*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 545 (Tenn. Crim. App. Aug. 7, 2020).

Evidence that methamphetamine was found in defendant's shoe, which was locked in a locker after being removed from defendant during booking, supported defendant's conviction for possession with intent to sell or deliver .5 grams or more of methamphetamine. *State v. Reed*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 645 (Tenn. Crim. App. Sept. 30, 2020).

Evidence was sufficient to support defendant's conviction of conspiracy to sell or deliver a controlled substance because it showed that a confidential informant (CI) purchased oxycodone and heroin from defendant on two occasions, defendant was seen on two separate occasions getting into the CI's car and going to another man's house to purchase heroin for the CI, the drugs provided by the CI were tested and determined to be oxycodone and heroin, and the testimony at trial revealed that on two separate occasions defendant purchased heroin from another man to sell to the CI. *State v. Woods*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 667 (Tenn. Crim. App. Oct. 12, 2020).

Evidence was sufficient to support defendant's conviction for sale of amphetamine because a confidential informant's testimony and a video recording of the controlled buy proved the sale of the controlled substance by defendant to the informant. Furthermore, after the transaction, the informant gave a police officer the capsules that the informant purchased, which forensic testing established contained amphetamine. *State v. Jones*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 691 (Tenn. Crim. App. Oct. 23, 2020).

Evidence was sufficient to show that defendant had physical control over the metham-

phetamine and an intent to exercise control over it because a false-bottom can containing a substantial amount of methamphetamine was found wedged beneath the passenger seat in his vehicle and he was carrying a large amount of cash on his person. *State v. Austin*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 695 (Tenn. Crim. App. Oct. 27, 2020).

Evidence was sufficient to convict defendant of the sale of 0.5 grams or more of cocaine and of the delivery of 0.5 grams or more of cocaine in a drug-free school zone because the school at issue was a secondary school as it provided an education normally available and required by state standards to be taught to children enrolled in grades seven through 12; and it awarded graduates high school diplomas and allowed them to transfer credits earned for courses taken at the school. *State v. Smith*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 716 (Tenn. Crim. App. Nov. 12, 2020).

Evidence was sufficient to convict defendant of the sale of 0.5 grams or more of cocaine and of the delivery of 0.5 grams or more of cocaine in a drug-free school zone because the "GIS" Planning Manager for the city testified that he routinely provided maps for the purposes of showing boundary areas around certain pieces of property and that the maps were accurate and relied upon by the city; the map introduced was an aerial photograph indicating a one thousand-foot buffer around the entire property of the strip mall where the school was located; and the location of the drug sale occurred within one thousand feet of any of the suites within the strip mall. *State v. Smith*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 716 (Tenn. Crim. App. Nov. 12, 2020).

There was sufficient evidence to support defendant's conviction for possession of marijuana with intent to deliver within 1,000 feet of a drug free zone, as defendant knew he was in possession of more than one-half ounce of marijuana, he admitted purchasing digital scales to weigh the marijuana, admitted that his intent was to give half of the marijuana to another individual, and he testified that he stopped his car in front of a high school. *State v. Jackson*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 741 (Tenn. Crim. App. Nov. 19, 2020).

Trial court properly denied defendant's motion for a new trial because defendant's appeal was untimely, the absence of a motion in limine hearing transcript and the motion for new trial transcript from the appellate record precluded review of the trial court's decision, and there was sufficient evidence to convict defendant of knowingly deliver a controlled substance where a confidential informant testified that he purchased cocaine from defendant, a forensic chemist's testimony showed that the substance was cocaine, a Schedule II controlled sub-

stance, that weighed .72 grams, and a police officer explained the exchange took place approximately 110 feet from a school building. *State v. Taylor*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 37 (Tenn. Crim. App. Jan. 29, 2021).

Evidence was sufficient to support defendant's conviction for selling a Schedule III, controlled substance because defendant picked up a confidential informant (CI) and without being told where to go or for what purpose used defendant's car to transport defendant's girlfriend and the CI to meet with a drug supplier, defendant gave to the supplier the money which the CI gave to defendant and defendant's girlfriend, and defendant and defendant's girlfriend gave the pills which the supplier gave to defendant and defendant's girlfriend to the CI. *State v. Strong*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 66 (Tenn. Crim. App. Feb., 28, 2021).

Evidence was sufficient to support defendant's conviction of the sale of 0.5 grams or more of methamphetamine and the delivery of 0.5 grams or more of methamphetamine because the confidential informant's (CI) testimony established that defendant was the man shown in the video of the transaction, after the CI gave defendant cash, defendant went into the house, and after several minutes came back out and leaned over the steps. The CI testified that he immediately went to the steps and picked up a bag of drugs. *State v. Hatchett*, —

S.W.3d —, 2021 Tenn. Crim. App. LEXIS 109 (Tenn. Crim. App. Mar. 24, 2021).

Evidence supported defendant's possession of cocaine and heroine with intent to sell or deliver convictions because defendant was found in possession of powder cocaine, bags of crack cocaine, bags of heroin, and cash in different denominations that was sorted into separate bundles. A police sergeant, testifying as an expert in the drug trade, noted that the drugs were indicative of a supply and a ready-to-sell component and believed defendant in jailhouse phone calls referenced to selling drugs and the money defendant made from selling drugs. *State v. Smith*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 148 (Tenn. Crim. App. Apr. 13, 2021).

12. —Insufficient.

Evidence was insufficient to support defendant's conviction for possession with the intent to sell or deliver more than 0.5 gram of cocaine when, during a traffic stop after defendant was observed speeding while driving a rental car, a police detective discovered a bag containing cocaine in the waistband of codefendant, the passenger in the car. However, none of the evidence directly connected defendant with the cocaine or created an inference that defendant had the knowledge and ability to exercise dominion and control over the cocaine. *State v. Wright*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 708 (Tenn. Crim. App. Nov. 2, 2020).

39-17-418. Simple possession or casual exchange.

NOTES TO DECISIONS

6. Sentence.

Trial court did not abuse its discretion in sentencing defendant for two counts of possession of methamphetamine with intent to sell, driving on revoked license, and possession of a controlled substance and drug paraphernalia; the sentences were within range, the trial court was free to give one mitigating factor zero

weight, and although the trial court did not reference T.C.A. § 40-35-102(5) explicitly, the sentence imposed was consistent with sentencing principles. Defendant had prior convictions and previously violated probation conditions. *State v. Declue*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 70 (Tenn. Crim. App. Mar. 4, 2021).

39-17-419. Inferences.

NOTES TO DECISIONS

ANALYSIS

1. Evidence Sufficient.
5. Inference.

1. Evidence Sufficient.

Evidence supported defendant's possession of cocaine and heroine with intent to sell or deliver convictions because defendant was found

in possession of powder cocaine, bags of crack cocaine, bags of heroin, and cash in different denominations that was sorted into separate bundles. A police sergeant, testifying as an expert in the drug trade, noted that the drugs were indicative of a supply and a ready-to-sell component and believed defendant in jailhouse phone calls referenced to selling drugs and the money defendant made from selling drugs.

State v. Smith, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 148 (Tenn. Crim. App. Apr. 13, 2021).

5. Inference.

Based upon the amount of cocaine seized during a traffic stop, the jury was permitted to

infer that the cocaine was possessed for purpose of selling or delivery. State v. Johnson, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 545 (Tenn. Crim. App. Aug. 7, 2020).

39-17-425. Unlawful drug paraphernalia uses and activities.

NOTES TO DECISIONS

ANALYSIS

1. Elements.
4. Burden of Proof.
5. Evidence Sufficient.
7. Sentencing.

1. Elements.

Offense of possession of drug paraphernalia does not require that the object at issue be used in large-scale drug operations involving the packaging and repackaging of substantial amounts of drugs; the definition and examples of drug paraphernalia reference certain items directly related to the personal use of drugs. State v. Foster, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 114 (Tenn. Crim. App. Mar. 26, 2021).

4. Burden of Proof.

While no proof was presented showing that the digital scale found in defendant's car contained drug residue, there was no requirement that the scale actually contain such in order for the State to prove defendant used or intended to use the scale to weigh a controlled substance, including marijuana. State v. Foster, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 114 (Tenn. Crim. App. Mar. 26, 2021).

5. Evidence Sufficient.

For purposes of defendant's conviction of possession of drug paraphernalia, the record supported the jury's determination that the digital

scale found in defendant's car was classifiable as drug paraphernalia; a deputy testified that digital scales were commonly used to weigh narcotics and the jury could have inferred that defendant used or intended to use the digital scale to prepare, package, or repack a controlled substance, including the marijuana found in his car. State v. Foster, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 114 (Tenn. Crim. App. Mar. 26, 2021).

7. Sentencing.

Trial court did not abuse its discretion in sentencing defendant for two counts of possession of methamphetamine with intent to sell, driving on revoked license, and possession of a controlled substance and drug paraphernalia; the sentences were within range, the trial court was free to give one mitigating factor zero weight, and although the trial court did not reference T.C.A. § 40-35-102(5) explicitly, the sentence imposed was consistent with sentencing principles. Defendant had prior convictions and previously violated probation conditions. State v. Declue, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 70 (Tenn. Crim. App. Mar. 4, 2021).

As to defendant's fine for possession of drug paraphernalia, the Tennessee General Assembly had determined that a mandatory minimum fine of \$150.00 was required for that particular offense; accordingly, the trial court did not abuse its discretion in imposing the \$150.00 fine fixed by the jury. State v. Foster, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 114 (Tenn. Crim. App. Mar. 26, 2021).

39-17-428. Mandatory minimum fines — Allocation of proceeds.

NOTES TO DECISIONS

2. Fine Proper.

As to defendant's fine for possession of drug paraphernalia, the Tennessee General Assembly had determined that a mandatory minimum fine of \$150.00 was required for that

particular offense; accordingly, the trial court did not abuse its discretion in imposing the \$150.00 fine fixed by the jury. State v. Foster, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 114 (Tenn. Crim. App. Mar. 26, 2021).

39-17-432. Drug-Free School Zone — Enhanced criminal penalties for violations within zone.

NOTES TO DECISIONS

ANALYSIS

5. Evidence Sufficient.
6. Sentencing.
9. Jury Instructions.

5. Evidence Sufficient.

Evidence was sufficient to convict defendant of the sale of 0.5 grams or more of cocaine and of the delivery of 0.5 grams or more of cocaine in a drug-free school zone because the school at issue was a secondary school as it provided an education normally available and required by state standards to be taught to children enrolled in grades seven through 12; and it awarded graduates high school diplomas and allowed them to transfer credits earned for courses taken at the school. *State v. Smith*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 716 (Tenn. Crim. App. Nov. 12, 2020).

Evidence was sufficient to convict defendant of the sale of 0.5 grams or more of cocaine and of the delivery of 0.5 grams or more of cocaine in a drug-free school zone because the “GIS” Planning Manager for the city testified that he routinely provided maps for the purposes of showing boundary areas around certain pieces of property and that the maps were accurate and relied upon by the city; the map introduced was an aerial photograph indicating a one thousand-foot buffer around the entire property of the strip mall where the school was located; and the location of the drug sale occurred

within one thousand feet of any of the suites within the strip mall *State v. Smith*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 716 (Tenn. Crim. App. Nov. 12, 2020).

6. Sentencing.

Trial court erred in granting defendants’ motions to dismiss the drug-free zone enhancement alleged in their presentments because the determination of whether the greenway was a public park as contemplated by the Drug-Free School Zone Act was a question of fact to be decided by the finder of fact; nothing indicated the legislature intended to limit the Act to public parks of only certain dimensions. *State v. Langley*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 561 (Tenn. Crim. App. Aug. 14, 2020).

9. Jury Instructions.

Because the jury was instructed that it had to find that the sale or delivery of drugs occurred within 1,000 feet of the real property that comprised a public or private elementary school, middle school or secondary school, and because the phrase “school property,” on which defendant wanted an instruction, did not appear in the criminal statute, the trial court properly used the terminology and definitions in the criminal statute enhancing defendant’s offense rather than the definition in T.C.A. tit. 49, related to education and signage. *State v. Smith*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 716 (Tenn. Crim. App. Nov. 12, 2020).

39-17-434. Manufacture, delivery, sale or possession of methamphetamines.

NOTES TO DECISIONS

ANALYSIS

1. Evidence Sufficient.
3. Sentence.

1. Evidence Sufficient.

After a jury convicted defendant of two counts of delivery of methamphetamine weighing more than .5 grams, the trial court properly imposed enhanced sentences of 25 years for each conviction, based on defendant’s extensive history of drug convictions, to be served concurrently because, on two separate dates, a confidential informant (CI) arranged to meet defendant to purchase methamphetamine from him, the CI’s testimony about the sale of the methamphetamine and defendant’s involvement

was direct evidence of his guilt, and were supported by the audio and video recordings of the transactions. *State v. Gray*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 679 (Tenn. Crim. App. Oct. 16, 2020).

3. Sentence.

Trial court did not abuse its discretion in sentencing defendant for two counts of possession of methamphetamine with intent to sell, driving on revoked license, and possession of a controlled substance and drug paraphernalia; the sentences were within range, the trial court was free to give one mitigating factor zero weight, and although the trial court did not reference T.C.A. § 40-35-102(5) explicitly, the sentence imposed was consistent with sentenc-

ing principles. Defendant had prior convictions and previously violated probation conditions. State v. Declue, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 70 (Tenn. Crim. App. Mar. 4, 2021).

PART 10 SEXUAL EXPLOITATION OF CHILDREN

39-17-1002. Part definitions.

NOTES TO DECISIONS

2. Sexual Activity.

Evidence was sufficient to convict defendant of solicitation of a minor because, given defendant's direct request for a photograph of the victim's breasts, and the victim's role in the photography, the evidence showed that defendant attempted to induce the victim to produce a lascivious exhibition of her breasts. State v. Mason, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 582 (Tenn. Crim. App. Aug. 25, 2020).

Evidence was sufficient to convict defendant of especially aggravated sexual exploitation of a minor because the image sent by the victim to defendant was a close-up photograph of the nine-year-old victim's privates; the victim was coached to take the photograph by defendant; and the photograph was overtly sexual. State v. Holbrooks, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 674 (Tenn. Crim. App. Oct. 14, 2020).

39-17-1005. Offense of especially aggravated sexual exploitation of a minor.

NOTES TO DECISIONS

3. Evidence.

Evidence was sufficient to convict defendant of solicitation of a minor because, given defendant's direct request for a photograph of the victim's breasts, and the victim's role in the photography, the evidence showed that defendant attempted to induce the victim to produce a lascivious exhibition of her breasts. State v. Mason, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 582 (Tenn. Crim. App. Aug. 25, 2020).

Evidence was sufficient to convict defendant of especially aggravated sexual exploitation of a minor because the image sent by the victim to defendant was a close-up photograph of the nine-year-old victim's privates; the victim was coached to take the photograph by defendant; and the photograph was overtly sexual. State v. Holbrooks, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 674 (Tenn. Crim. App. Oct. 14, 2020).

PART 13 WEAPONS

39-17-1307. Unlawful carrying or possession of a weapon. [Effective until July 1, 2021. See the version effective on July 1, 2021.]

NOTES TO DECISIONS

ANALYSIS

- 7. Evidence Sufficient.
- 9. Sentencing.
- 12. Bifurcate.

7. Evidence Sufficient.

Evidence was sufficient to establish defendant's identity as the perpetrator because the victim testified to being robbed by masked and armed men in the victim's home, a police officer saw an individual matching the description of one of the assailants, a police dog tracked the individual to where defendant came out from behind a shed and said, "I give up," a gun was

found in a nearby trash can, the victim identified defendant in a show-up identification, and defendant made incriminating statements during recorded telephone calls while in jail. State v. Ward, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 516 (Tenn. Crim. App. July 28, 2020).

Evidence supported defendant's convictions for being a felon in possession of a firearm because defendant and co-defendant trailed the victim in co-defendant's car to rob the victim, co-defendant stopped and approached the victim with a gun to rob the victim, defendant fatally shot the victim when the victim pulled out a gun, and co-defendant left the victim's purse behind and fled the scene with defendant in co-defendant's car. Defendant previously was

convicted of felony crimes involving the use or attempted use of violence and drug offenses. *State v. Bowen*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 19 (Tenn. Crim. App. Jan. 12, 2021).

Evidence was sufficient to convict defendant of two counts of unlawful possession of a firearm by a convicted felon because he was previously convicted of a felony involving the use or attempted use of violence and of two felony drug offenses; and it was undisputed defendant possessed a weapon during and immediately after shooting the victim. *State v. Bowen*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 149 (Tenn. Crim. App. Apr. 13, 2021).

9. Sentencing.

Trial court erred in sentencing defendant for defendant's unlawful possession of a firearm by a convicted felon counts because the court incorrectly classified the conviction of the count

for conviction of a felony crime involving violence or its attempted use as a Class C felony and the conviction of the other count for conviction of a felony drug offense as a Class D felony. As a result, the case had to be remanded to the trial court for a new sentencing hearing. *State v. Bowen*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 19 (Tenn. Crim. App. Jan. 12, 2021).

12. Bifurcate.

Trial court did not err in denying defendant's motion to bifurcate the felon in possession of a firearm count, as the parties entered into a stipulation at trial as to his prior felonies and the trial court instructed the jury it could consider the stipulation only as it related to the elements of possession of a firearm by a convicted felon and for no other purpose. *State v. Howard*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 27 (Tenn. Crim. App. Jan. 15, 2021).

39-17-1307. Unlawful carrying or possession of a weapon. [Effective on July 1, 2021. See the version effective until July 1, 2021.]

NOTES TO DECISIONS

ANALYSIS

7. Evidence Sufficient.
9. Sentencing.
12. Bifurcate.

7. Evidence Sufficient.

Evidence was sufficient to establish defendant's identity as the perpetrator because the victim testified to being robbed by masked and armed men in the victim's home, a police officer saw an individual matching the description of one of the assailants, a police dog tracked the individual to where defendant came out from behind a shed and said, "I give up," a gun was found in a nearby trash can, the victim identified defendant in a show-up identification, and defendant made incriminating statements during recorded telephone calls while in jail. *State v. Ward*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 516 (Tenn. Crim. App. July 28, 2020).

Evidence supported defendant's convictions for being a felon in possession of a firearm because defendant and co-defendant trailed the victim in co-defendant's car to rob the victim, co-defendant stopped and approached the victim with a gun to rob the victim, defendant fatally shot the victim when the victim pulled out a gun, and co-defendant left the victim's purse behind and fled the scene with defendant in co-defendant's car. Defendant previously was convicted of felony crimes involving the use or attempted use of violence and drug offenses. *State v. Bowen*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 19 (Tenn. Crim. App. Jan. 12, 2021).

Evidence was sufficient to convict defendant of two counts of unlawful possession of a firearm by a convicted felon because he was previously convicted of a felony involving the use or attempted use of violence and of two felony drug offenses; and it was undisputed defendant possessed a weapon during and immediately after shooting the victim. *State v. Bowen*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 149 (Tenn. Crim. App. Apr. 13, 2021).

9. Sentencing.

Trial court erred in sentencing defendant for defendant's unlawful possession of a firearm by a convicted felon counts because the court incorrectly classified the conviction of the count for conviction of a felony crime involving violence or its attempted use as a Class C felony and the conviction of the other count for conviction of a felony drug offense as a Class D felony. As a result, the case had to be remanded to the trial court for a new sentencing hearing. *State v. Bowen*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 19 (Tenn. Crim. App. Jan. 12, 2021).

12. Bifurcate.

Trial court did not err in denying defendant's motion to bifurcate the felon in possession of a firearm count, as the parties entered into a stipulation at trial as to his prior felonies and the trial court instructed the jury it could consider the stipulation only as it related to the elements of possession of a firearm by a convicted felon and for no other purpose. *State v. Howard*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 27 (Tenn. Crim. App. Jan. 15, 2021).

39-17-1324. Offense of possessing firearm or antique firearm during commission or attempt to commit dangerous felony.**NOTES TO DECISIONS****ANALYSIS**

1. Dangerous Felony.
7. Evidence Sufficient.
13. Sentence Affirmed.

1. Dangerous Felony.

Trial court properly denied defendant's request to withdraw his guilty plea; while the 100 percent service rate for the entire 10-year sentence in count three was illegal because defendant's prior Louisiana armed robbery convictions did not qualify as a dangerous felony, the trial court appropriately found that the illegal aspect of the sentence was not a material component of the plea. The proper remedy was to amend defendant's sentence. *State v. Smith*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 141 (Tenn. Crim. App. Apr. 12, 2021).

7. Evidence Sufficient.

Evidence was sufficient to establish defendant's identity as the perpetrator because the victim testified to being robbed by masked and armed men in the victim's home, a police officer saw an individual matching the description of one of the assailants, a police dog tracked the individual to where defendant came out from behind a shed and said, "I give up," a gun was found in a nearby trash can, the victim identified defendant in a show-up identification, and defendant made incriminating statements during recorded telephone calls while in jail. *State v. Ward*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 516 (Tenn. Crim. App. July 28, 2020).

Evidence was sufficient to support second and third defendants' convictions for aggravated robbery, theft, conspiracy, aggravated burglary, and firearms offenses, as it showed that first defendant devised a plan to conduct a home invasion and steal stuff, he enlisted others, including second and third defendants, to carry out the plan, and the group carried out the plan, which included the use of masks, gloves, and a gun to take the items from the victim's home. *State v. Morales*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 619 (Tenn. Crim. App. Sept. 18, 2020).

Evidence was sufficient to convict defendant of first degree felony murder, criminal attempt to commit second degree murder, aggravated robbery, and employing a firearm during the commission of a felony because defendant and co-defendant, each wielding a deadly weapon,

approached the victims on the front porch of a residence; an altercation between the four men ensued; defendant pointed an automatic pistol at the first victim; while brandishing his weapon, co-defendant took cash from each victim and a cell phone from the second victim; when the second victim attempted to defend himself, co-defendant fired five shots; and the second victim later died from his gunshot wounds. *State v. Wilson*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 719 (Tenn. Crim. App. Nov. 10, 2020).

Evidence was sufficient to support defendant's convictions of second degree murder, attempted second degree murder, and employing a firearm during the commission of a dangerous felony because it showed that defendant had previously shot the victim, they got into an argument at a store, when the victim and his friend left the store on a scooter defendant and his friends began shooting them, the victim's friend identified defendant as one of the men who shot at them, and the victim's cause of death was two gunshot wounds to the chest. *State v. Stevenson*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 798 (Tenn. Crim. App. Dec. 16, 2020).

Evidence was sufficient for the jury to reject defendant's claim of self-defense and find him guilty of voluntary manslaughter, attempted voluntary manslaughter, and employing a firearm during the commission of a dangerous felony, as the proof at trial was that multiple shots were fired from the direction of defendant's porch toward the location of the victim's car and a second victim was shot in the back while he seated in the rear seat of the car, which was driving away from the scene at the time. *State v. Howard*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 27 (Tenn. Crim. App. Jan. 15, 2021).

Evidence was sufficient to sustain defendant's conviction for employment of a firearm during the commission of or attempt to commit a dangerous felony because defendant admitted that he had a firearm, and a rational juror could conclude that he intended to "go armed" because a police officer followed him into the trailer park and he had an outstanding arrest warrant. Moreover, after the officer pulled up to the trailer, a witness saw defendant put the gun in his waistband. *State v. Moon*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 55 (Tenn. Crim. App. Feb. 14, 2021).

Evidence was insufficient to support defendant's conviction for possession of a firearm by a felon with a prior felony drug conviction because defendant had a prior felony conviction at the time of the offense and the evidence was more than sufficient to support defendant's conviction for attempted first-degree murder. *State v. Smith*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 148 (Tenn. Crim. App. Apr. 13, 2021).

13. Sentence Affirmed.

Trial court did not abuse its discretion by imposing consecutive sentences upon defen-

dant's convictions for two counts each of aggravated burglary, employing a firearm during the commission of a dangerous felony, and aggravated robbery because, by operation of law, the sentence for employing a firearm during the commission of a dangerous felony was to be served consecutive to any other sentence defendant was serving at the time of the offense or was sentenced to serve for conviction of the underlying dangerous felony. *State v. Anderson*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 76 (Tenn. Crim. App. Mar. 5, 2021).

TITLE 40

CRIMINAL PROCEDURE

CHAPTER.

39. OFFENDER REGISTRATION AND MONITORING.

Part 2 Tennessee Sexual Offender and Violent Sexual Offender Registration, Verification and Tracking Act of 2004

CHAPTER 2

LIMITATION OF PROSECUTIONS

40-2-101. Felonies.

NOTES TO DECISIONS

10. Statute of Limitations.

Defendant's prosecution for aggravated rape was not barred by the fifteen-year statute of limitations because the statute of limitations was tolled in that defendant was not ordinarily and openly living in Tennessee when defendant

was incarcerated in and living as a resident of Louisiana. Furthermore, defendant did not establish that the pre-indictment delay violated defendant's right to a fair trial. *State v. Jackson*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 112 (Tenn. Crim. App. Mar. 25, 2021).

40-2-103. Period of concealment of crime or absence from state.

NOTES TO DECISIONS

4. Prosecution Timely.

Defendant's prosecution for aggravated rape was not barred by the fifteen-year statute of limitations because the statute of limitations was tolled in that defendant was not ordinarily and openly living in Tennessee when defendant

was incarcerated in and living as a resident of Louisiana. Furthermore, defendant did not establish that the pre-indictment delay violated defendant's right to a fair trial. *State v. Jackson*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 112 (Tenn. Crim. App. Mar. 25, 2021).

CHAPTER 6

WARRANTS

PART 1 SEARCH WARRANTS

40-6-103. Probable cause and affidavit.

NOTES TO DECISIONS

4. Affidavit — Sufficiency.

Trial court erred in denying defendant's motion to suppress evidence obtained pursuant to a search warrant for the contents of defendant's cell phone because the warrant lacked the required particularity as the affidavit sought an unfettered search of all data on the cell phone and did not specify the specific types of data

which had relevance to the investigation or the factual basis for the affiant's belief that the data existed. The error was harmless beyond a reasonable doubt as the proof at trial of defendant's guilt was overwhelming. *State v. McLawhorn*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 686 (Tenn. Crim. App. Oct. 20, 2020).

40-6-104. Examination of complainant.

NOTES TO DECISIONS

7. Particularity.

Trial court erred in denying defendant's motion to suppress evidence obtained pursuant to a search warrant for the contents of defendant's cell phone because the warrant lacked the required particularity as the affidavit sought an unfettered search of all data on the cell phone and did not specify the specific types of data

which had relevance to the investigation or the factual basis for the affiant's belief that the data existed. The error was harmless beyond a reasonable doubt as the proof at trial of defendant's guilt was overwhelming. *State v. McLawhorn*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 686 (Tenn. Crim. App. Oct. 20, 2020).

CHAPTER 11

BAIL

PART 2 FORFEITURE OF BAIL

40-11-203. Exoneration by surrender of defendant.

NOTES TO DECISIONS

3. Court with Authority to Exonerate.

Trial court lost subject matter jurisdiction over a bail bonding company's motions to exonerate because the trial court lost subject matter jurisdiction to amend or modify its final judgment when the bail bonding company filed a

notice of appeal seeking relief from the final judgment. *State v. La Ron Houston-Church* (In re 911 Bail Bonding, LLC, Surety), — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 46 (Tenn. Crim. App. Feb. 9, 2021).

CHAPTER 14

RIGHTS OF DEFENDANTS

PART 2 COUNSEL FOR INDIGENTS

40-14-207. Compensation — Necessary services for indigent defendants.

NOTES TO DECISIONS

5. Non-Capital Cases.

Post-conviction court properly denied defendant's request to receive funding for a mental health expert witness at the post-conviction stage because defendant was not entitled to expert services in a non-capital case wherein

defendant was sentenced to life plus five years following convictions of first degree murder, arson, possession of a shotgun with an altered serial number, and theft. *Maraschiello v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 780 (Tenn. Crim. App. Dec. 4, 2020).

CHAPTER 17

EVIDENCE AND WITNESSES

PART 2 UNIFORM LAW TO SECURE ATTENDANCE OF WITNESSES

40-17-204. Issuance of summons.

NOTES TO DECISIONS

2. Authority of Post-Conviction Court.

Petitioner failed to establish that granting yet another continuance would have benefitted him, and thus he was not entitled to post-conviction relief; despite repeated continuances, he waited until the day before the hearing to complain about his inability to secure the attendance of appellate counsel, an out-of-state

resident, and while neither petitioner nor post-conviction counsel requested that a subpoena be issued for appellate counsel, the post-conviction court correctly stated that it did not have the authority to issue such a subpoena. *McKaughan v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 21 (Tenn. Crim. App. Jan. 13, 2021).

CHAPTER 18

TRIAL AND VERDICT

40-18-110. Charge as to lesser included offenses — Written request.

NOTES TO DECISIONS

4. Instruction Not Required.

Trial court's failure to instruct the jury on solicitation and facilitation did not rise to the level of plain error as consideration of the issue was not necessary to do substantial justice because, considering the weight of the evidence

presented and the defenses presented by the parties, the omission of the solicitation and facilitation instructions did not affect the outcome of the trial. *State v. Robinson*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 96 (Tenn. Crim. App. Mar. 17, 2021).

CHAPTER 26
APPEAL

40-26-105. Writ of error coram nobis.

NOTES TO DECISIONS

ANALYSIS

- 4. Petition for Writ.
- 5. —Denied.
- 12. Petition Properly Denied.

4. Petition for Writ.

5. —Denied.

Trail court acted within its discretion in denying the petition for writ of error coram nobis because defendant knew the underlying fact of the victim’s gang affiliation prior to or during trial and therefore testimony about that affiliation was not newly discovered evidence for the purpose of error coram nobis relief. *State v. Sales*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 621 (Tenn. Crim. App. Sept. 17, 2020).

12. Petition Properly Denied.

Petitioner’s contention relative to his coram nobis petition that the post-conviction court erred by discrediting the victim’s revised testimony was rejected because petitioner and the victim were not credible witnesses, the victim’s explanation of the impetus motivating him to prepare the affidavit, which was clearly addressed to a court and made no specific reference to the victim’s having threatened petitioner with a gun, was less than compelling, and the notes in trial counsel’s file were of

uncertain provenance. *Harbison v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 740 (Tenn. Crim. App. Nov. 17, 2020).

Dismissal of defendant’s petition for a writ of error coram nobis was appropriate because defendant’s argument that a log from the narcotics unit for a sheriff’s department which showed monies provided to certain confidential informants for undercover transactions did not show that money was provided to the confidential informant in defendant’s case amounted to nothing more than potential impeachment evidence. *Story v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 111 (Tenn. Crim. App. Mar. 25, 2021).

Trial court did not err by dismissing the petition for writ of error coram nobis because it was not filed within the limitations period and petitioner never submitted affidavits to support the claims in the petition. There was no affidavit from trial counsel regarding whether the Open Records Request documents were available to him at the time of trial; without such an affidavit, the trial court could not have concluded that the evidence was newly discovered, that it was later arising, that petitioner was without fault in timely presenting the evidence, or that petitioner was entitled to due process tolling. *Skinner v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 128 (Tenn. Crim. App. Mar. 25, 2021).

CHAPTER 30
POST-CONVICTION PROCEDURE

PART 1 GENERAL PROVISIONS

40-30-102. When prisoners may petition for post-conviction relief.

NOTES TO DECISIONS

ANALYSIS

- 7. Construction With Federal Habeas Relief.
- 10. Not Entitled to Relief.
- 11. Tolling.
- 13. Petition Time Barred.

7. Construction With Federal Habeas Relief.

Petitioner failed to exhaust his claim that counsel failed to conduct an adequate investigation because he failed to present a factual basis to the state courts; because petitioner no longer had a means by which to pursue his

claim in state court, the issue was procedurally defaulted. *Butler v. Myers*, — F.3d —, — FED App. —, 2021 U.S. App. LEXIS 2140 (6th Cir. Jan. 27, 2021).

10. Not Entitled to Relief.

Defendant failed to prove that trial counsel was ineffective for not filing a recusal motion, for the manner in which counsel handled motions and hearings to suppress, for the failure to move to sever the aggravated sexual battery and especially aggravated sexual exploitation of a minor offenses for trial, for the failure to challenge the State of Tennessee's election of offenses, for the failure to argue that the State did not establish venue, and for the failure to raise amendment of the indictment as an issue in a motion for new trial. *Wilson v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 806 (Tenn. Crim. App. Dec. 22, 2020).

Defendant was not entitled to post-conviction relief because defendant failed to prove that appellate counsel was ineffective in that appellate counsel explained that counsel chose to raise the issues which counsel believed had the best chance of success on appeal and that counsel did not raise suppression issues or lack of the suppression hearing transcripts as counsel did not believe that those issues stood any chance of success. *Wilson v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 806 (Tenn. Crim. App. Dec. 22, 2020).

Because defendant failed to introduce any new scientific evidence that would have supported defendant's claim of actual innocence, the denial of relief by the post-conviction court was appropriate. *French v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 103 (Tenn. Crim. App. Mar. 23, 2021).

11. Tolling.

Although defendant's petition for post-conviction relief was filed outside the one-year statute of limitations applicable to post-conviction proceedings, because the appellate court was unable to determine from the record whether due process required the tolling of the statute of limitations, the appellate court va-

cated the post-conviction court's order and remanded the case to the post-conviction court for a determination of whether due process tolling applied. *Brown v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 146 (Tenn. Crim. App. Apr. 13, 2021).

13. Petition Time Barred.

Postconviction court properly dismissed defendant's petition for relief as time-barred because his petition for post-conviction relief exceeded the statute of limitations by approximately three months where the statute of limitations began to run on the day the Tennessee Supreme Court denied review, statutory tolling did not apply as there was no newly recognized constitutional right in defendant's case, and no authority existed for due process tolling of the statute of limitations due to bad advice from inmate legal advisors. *Taylor v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 519 (Tenn. Crim. App. July 28, 2020).

Petition for post-conviction relief was untimely, and the appellate court was without jurisdiction to consider it on appeal because petitioner had one year from the date of the final action of the highest state appellate court to which an appeal was taken to file his petition for post-conviction relief; the appellate court filed its opinion on December 23, 2015, and petitioner had until December 23, 2016, to file his petition for post-conviction relief, yet he waited until February 13, 2017, to seek relief; and the case did not fall within the three exceptions set forth in this statute that allowed for the filing of a petition for post-conviction relief outside the one-year statute of limitations. *Funzie v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 721 (Tenn. Crim. App. Nov. 10, 2020).

Denial of post-conviction relief based on the inmate's failure to file a motion within one year was proper because tolling was not required since the case did not involve changes to the Post-Conviction Procedure Act and the inmate's offense was included as a required offense for registration at the time of his plea. *Sykes v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 9 (Tenn. Crim. App. Jan. 8, 2021).

40-30-103. Grounds for relief.

NOTES TO DECISIONS

ANALYSIS

3. Violation of Constitutional Right Required.
5. —Competence of Counsel.
7. Guilty Plea.
10. Denial of Relief.
13. Petition Properly Denied.

3. Violation of Constitutional Right Required.

Petitioner was sitting on the couch in his home when he spoke with police and gave the non-inculpatory statement that was used at trial, plus he testified at trial that at the time he spoke with police, he did not think police had an arrest warrant or probable cause to arrest

him; he did not show that he was subjected to custodial interrogation requiring the police to advise him of his Miranda rights, and his claim for post-conviction relief was properly denied. *McKaughan v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 21 (Tenn. Crim. App. Jan. 13, 2021).

Petitioner presented no proof that he suffered a Gerstein violation, nor did he establish any connection between his detention and the evidence adduced at trial; therefore, he failed to establish a Fourth Amendment violation and he was not entitled to post-conviction relief. *McKaughan v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 21 (Tenn. Crim. App. Jan. 13, 2021).

5. —Competence of Counsel.

Inmate was not entitled to post-conviction relief based on ineffective assistance when the inmate thought a law enforcement officer guaranteed the inmate probation in exchange for the inmate's assistance, and counsel did not ensure the inmate understood a plea agreement, because (1) the inmate understood a guilty plea and the plea's consequences, including a lack of guaranteed probation, and (2) counsel credibly testified the plea agreement did not guarantee a sentence, and counsel said counsel advised the inmate the inmate faced mandatory incarceration and was unlikely to be immediately released thereafter. *Cole v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 486 (Tenn. Crim. App. July 16, 2020).

In an aggravated sexual battery case, trial counsel was not ineffective for failing to investigate or call two witnesses because the testimony of the witnesses at the post-conviction hearing only had bearing on defendant's general character and on his back injury; at trial, defendant's mother, sister, and wife gave similar testimony about his character and injury; the witnesses actually presented at trial were able to give more detailed testimony and also had testimony that was relevant to defendant's relationship with the child victim; and there was no reasonable probability that, had the omitted witnesses been presented at trial, the result of the proceeding would have been different. *Davis v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 512 (Tenn. Crim. App. July 27, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 537 (Tenn. Oct. 7, 2020).

In an aggravated sexual battery case, trial counsel was not ineffective for failing to present evidence of defendant's erectile dysfunction because counsel testified that she felt it was strategically necessary to present proof that defendant was sexually active with the victim's mother as she felt that the defense needed to provide an explanation for the child victim's sexual knowledge as an alternative to the explanation that she gained the knowledge through abuse by defendant; and the evidence

would have been in conflict with defendant's own testimony. *Davis v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 512 (Tenn. Crim. App. July 27, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 537 (Tenn. Oct. 7, 2020).

Defendant's petition for post-conviction relief was properly denied because counsel was not ineffective in failing to keep defendant's mental health expert in the courtroom to observe his testimony and that of the State's rebuttal expert witness as defendant's family would have incurred an additional charge for the expert's continued presence in the courtroom; and counsel consulted with the expert ahead of time about his cross-examination of the State's expert based on her anticipated testimony. *Halliburton v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 554 (Tenn. Crim. App. Aug. 13, 2020).

Defendant's petition for post-conviction relief was properly denied because counsel was not ineffective in allowing for the relationship between defendant and counsel to deteriorate resulting in poor communication because counsel testified that, despite his difficulties with defendant, he did not believe that communication between them had completely broken down and they were able to develop a strategy for trial; and counsel presented the defense that defendant chose to present. *Halliburton v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 554 (Tenn. Crim. App. Aug. 13, 2020).

Denial of post-conviction relief was appropriate because defendant failed to demonstrate deficiency or prejudice with regard to defendant's claims of ineffective assistance of counsel as defendant failed to establish a reasonable probability that the outcome of the proceeding would have changed if defendant's trial counsel had performed the acts which defendant claimed were necessary for counsel to have performed. *Davis v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 576 (Tenn. Crim. App. Aug. 25, 2020).

Defendant was not entitled to post-conviction relief because counsel's testimony established that upon learning that counsel had a conflict of interests related to two of defendant's four cases, counsel notified defendant of the conflict and told defendant that counsel could not represent defendant in those cases. When defendant opted to retain a second counsel for the cases in which counsel could not represent defendant, counsel was not involved with those cases and did not participate in the plea negotiations involving all four cases. *Currie v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 611 (Tenn. Crim. App. Sept. 17, 2020).

Defendant was not entitled to postconviction relief because defendant failed to prove that counsel at the suppression hearing was ineffective for failing to put on evidence concerning defendant's alleged intoxication when making statements to the police; that counsels at trial

were ineffective for failing to communicate with defendant, review the suppression hearing transcript, and present a cohesive theory of defense; and that appellate counsel was ineffective for failing to include a transcript from the suppression hearing in the record. *Buford v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 630 (Tenn. Crim. App. Sept. 24, 2020).

Defendant failed to prove that defendant's trial counsel was ineffective for failing to present witnesses and evidence in defendant's favor as counsel testified that counsel interviewed proposed witnesses, but did not believe that they could provide a solid alibi, and defendant did not establish prejudice in that defendant failed to present the witnesses at a post-conviction hearing. Defendant also failed to show how counsel was deficient in failing to present defendant's employment records and how defendant was prejudiced by this decision. *Alvarado v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 638 (Tenn. Crim. App. Sept. 25, 2020).

Although defendant claimed that defendant's trial counsel denied defendant of defendant's fundamental right to testify, defendant failed to prove that counsel's performance as to this issue was deficient or prejudicial because, although counsel encouraged defendant not to testify, it was ultimately defendant's decision to voluntarily and personally waive the right to testify. *Alvarado v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 638 (Tenn. Crim. App. Sept. 25, 2020).

Trial counsel was not ineffective because, during the guilty plea colloquy, counsel advised the court that he would be recommending defendant for placement at a special needs facility, and the trial court noted the recommendation on the judgment form; and counsel testified at the post-conviction hearing that he neither misled defendant into believing nor guaranteed to defendant that he would serve his sentence at the special needs facility. *Aldridge v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 648 (Tenn. Crim. App. Sept. 29, 2020).

Defendant's petition for post-conviction relief was properly denied as trial counsel was not ineffective in failing to file a motion to suppress because nothing in the letters from defendant's cellmate indicated that he was being directed to act or compensated for eliciting information from defendant; and the appellate court had all the existing evidence pertinent to any agreement made by the government, acting through a detective, with the cellmate when it concluded that the cellmate was not a State agent. *Frelix v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 653 (Tenn. Crim. App. Oct. 5, 2020).

Defendant failed to prove that defendant received ineffective assistance of counsel regarding defendant's guilty plea because defendant failed to show that counsel was deficient in failing to properly investigate the case, was

deficient as to discovery, was deficient in not meeting with defendant at the jail, was deficient in failing to adequately meet with defendant, and was deficient in advising defendant as to sentencing. Furthermore, defendant failed to prove that the guilty plea was unknowingly or involuntarily entered because of counsel. *Mitchell v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 682 (Tenn. Crim. App. Oct. 16, 2020).

Defendant was not entitled to post-conviction relief because any error by trial counsel in failing to object to the testimony of a witness, who was responsible for monitoring inmate phone calls for the sheriff's office, regarding the recordings of defendant's phone calls from jail on the ground that the State of Tennessee had not qualified the witness as an expert in voice recognition was harmless as defendant readily admitted under cross-examination at trial that it was defendant's voice on the calls. *Harris v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 683 (Tenn. Crim. App. Oct. 16, 2020).

Defendant was not entitled to post-conviction relief because defendant did not prove that trial counsel was ineffective by not calling witness as defendant failed to present the proposed witnesses or a mental health expert at the post-conviction hearing. Defendant also failed to establish that trial counsel was ineffective in failing to present a mental health defense as there was no proof at the post-conviction hearing to establish if or how defendant's diagnosis of generalized anxiety disorder impacted the offense. *Harris v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 683 (Tenn. Crim. App. Oct. 16, 2020).

Defendant was not entitled to post-conviction relief because defendant failed to prove resulting prejudice from defendant's ineffective assistance of counsel claims based on trial counsel failing to subpoena alibi witnesses to testify, failing to present video evidence to show that defendant was not at the scene of the crime, and failing to challenge an allegedly biased juror. Defendant failed to show prejudice as defendant did not present the alibi witnesses to testify, show the video evidence, or call the juror at the evidentiary hearing. *Lee v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 706 (Tenn. Crim. App. Oct. 30, 2020).

Defendant was not entitled to post-conviction relief because defendant failed to prove that defense counsel did not allow defendant to effectively participate in defendant's own defense. Furthermore, counsel was not ineffective for failing to file a motion to sever the felony neglect, aggravated child abuse, and felony murder counts against defendant for separate trials because the cases were mandatorily joined as the incidents were part of a single continuing episode of multiple abuse of the victim over the course of days. *Demeza v. State*,

— S.W.3d —, 2020 Tenn. Crim. App. LEXIS 707 (Tenn. Crim. App. Oct. 30, 2020).

Petition for post-conviction relief was properly denied as trial counsel was not ineffective because defendant failed to present the testimony of a medical expert or the medical records that he claimed would have benefited his defense; he failed to show what additional evidence counsel could have discovered with further investigation; he failed to establish his claim that counsel did not properly investigate or call a witness as he did not present the witness or evidence to the post-conviction court; the post-conviction court accredited trial counsel's testimony that he was prepared for trial and that the decision to not call certain witnesses was strategic; and counsel made no guarantees to defendant as to the outcome of his case. *Hernandez v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 760 (Tenn. Crim. App. Nov. 30, 2020).

Defendant's petition for post-conviction relief was properly denied as trial counsel was not ineffective for failing to file a motion to suppress the jail calls with his mother because, while counsel did not file a motion to suppress the calls, he filed a motion in limine to exclude the portions of the calls during which defendant made reference to what he said in the police interrogation that had been suppressed pursuant to an earlier suppression motion filed by initial counsel; and he failed to prove that a motion to suppress would have been granted. *Griffin v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 762 (Tenn. Crim. App. Nov. 30, 2020).

Defendant's petition for post-conviction relief was properly denied as trial counsel was not ineffective for failing to file a motion to continue to have more time to consider and research the issue of the jail calls because he did not demonstrate that a motion to continue would have been granted; he did not show or allege in his brief how a continuance or additional research would have changed the outcome of his case; and the post-conviction court accredited trial counsel's testimony that he was prepared for trial. *Griffin v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 762 (Tenn. Crim. App. Nov. 30, 2020).

Petitioner failed to show ineffective assistance of counsel for failure to request merging his convictions and thus he was not entitled to postconviction relief; because petitioner's sentences were already running concurrently, merging the convictions did not affect the length of his sentence, plus the appropriate remedy for a double jeopardy violation would be merger of the convictions, which the postconviction court already granted. *Jones v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 767 (Tenn. Crim. App. Nov. 30, 2020).

Defendant was not entitled to post-conviction relief because defendant failed to prove that

defense counsel provided ineffective assistance by failing to present witnesses to support a heat of passion defense and by failing to communicate defendant's acceptance of an alleged plea offer to the State of Tennessee. *Maraschiello v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 780 (Tenn. Crim. App. Dec. 4, 2020).

Defendant failed to establish that defendant's trial counsel provided ineffective assistance of counsel or that defendant's guilty plea was involuntarily and unknowingly entered as a result. The post-conviction court accredited trial counsel's testimony and found that counsel adequately investigated defendant's case and prepared for defendant trial and that defendant understood the consequences of entering a guilty plea and that defendant did so in defendant's best interest. *Hunter v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 799 (Tenn. Crim. App. Dec. 17, 2020).

Defendant failed to prove that trial counsel was ineffective for not filing a recusal motion, for the manner in which counsel handled motions and hearings to suppress, for the failure to move to sever the aggravated sexual battery and especially aggravated sexual exploitation of a minor offenses for trial, for the failure to challenge the State of Tennessee's election of offenses, for the failure to argue that the State did not establish venue, and for the failure to raise amendment of the indictment as an issue in a motion for new trial. *Wilson v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 806 (Tenn. Crim. App. Dec. 22, 2020).

Defendant was not entitled to post-conviction relief because defendant failed to prove that appellate counsel was ineffective in that appellate counsel explained that counsel chose to raise the issues which counsel believed had the best chance of success on appeal and that counsel did not raise suppression issues or lack of the suppression hearing transcripts as counsel did not believe that those issues stood any chance of success. *Wilson v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 806 (Tenn. Crim. App. Dec. 22, 2020).

Post-conviction court found no evidence of prosecutorial misconduct and that trial counsel was not deficient for failing to challenge any alleged prosecutorial misconduct; the record did not preponderate against this finding and petitioner was not entitled to relief. *McKaughan v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 21 (Tenn. Crim. App. Jan. 13, 2021).

Petitioner was not entitled to post-conviction relief based on ineffective assistance of counsel; a police officer testified that petitioner's mother gave the officers permission to enter the house in which she lived with petitioner, and he did not call any witnesses or offer any evidence at the post-conviction hearing to show that the search was illegal, nor did he show prejudice. *McKaughan v. State*, — S.W.3d —, 2021 Tenn.

Crim. App. LEXIS 21 (Tenn. Crim. App. Jan. 13, 2021).

Petitioner failed to establish that granting yet another continuance would have benefitted him, and thus he was not entitled to post-conviction relief; despite repeated continuances, he waited until the day before the hearing to complain about his inability to secure the attendance of appellate counsel, an out-of-state resident, and while neither petitioner nor post-conviction counsel requested that a subpoena be issued for appellate counsel, the post-conviction court correctly stated that it did not have the authority to issue such a subpoena. *McKaughan v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 21 (Tenn. Crim. App. Jan. 13, 2021).

Trial court found that multiple layers of hearsay might make petitioner's potential testimony inadmissible and trial counsel did not call petitioner to make an offer of proof after the trial court's warning, and at the post-conviction hearing, petitioner did not specify what his offer of proof would have been or explain how any exceptions to hearsay applied to make the evidence admissible; ineffective assistance was not shown and petitioner was not entitled to relief. *McKaughan v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 21 (Tenn. Crim. App. Jan. 13, 2021).

At the time of the plea hearing, trial counsel's advice was reasonable and based upon the evidence available to trial counsel at the time, plus petitioner never affirmatively testified that he would have accepted the plea offer; thus, he was not entitled to postconviction relief based on ineffective assistance of counsel. *McKaughan v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 21 (Tenn. Crim. App. Jan. 13, 2021).

Photographs taken during the victim's forensic examination were properly used at trial to demonstrate why the doctor reached her conclusions regarding the victim's injuries; counsel had filed a motion in limine to exclude the photographs and was not deficient, such that petitioner was not entitled to post-conviction relief. *McKaughan v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 21 (Tenn. Crim. App. Jan. 13, 2021).

Post-conviction court found that trial counsel was deficient when he failed to sufficiently cross-examine a witness, but the court also found that other testimony at the post-conviction hearing was not credible and the witness had no motive to coach the victim to make the accusations; the post-conviction court properly found that petitioner failed to prove that he was prejudiced by any alleged deficiency and thus was not entitled to post-conviction relief. *McKaughan v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 21 (Tenn. Crim. App. Jan. 13, 2021).

Victim testified that the kissing occurred prior to the date of the aggravated sexual battery as stated in the indictment, and State repeatedly mentioned the date of the offense and emphasized that the charges related to the allegations of fondling the victim underneath the blanket, such that no election of offenses was necessary; thus, counsel was not deficient for failing to ask for an election and petitioner was not entitled to post-conviction relief. *McKaughan v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 21 (Tenn. Crim. App. Jan. 13, 2021).

Defendant was not entitled to post-conviction relief because defendant failed to show that trial counsel was in any way deficient in counsel's performance or that defendant was prejudiced as the result of any alleged deficiency on the part of counsel. Furthermore, trial counsel's testimony, which was implicitly accredited by the post-conviction court, established that counsel reviewed discovery, investigated and discussed the case with defendant, and made well-informed strategic decisions about witnesses and trial strategy. *Watkins v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 32 (Tenn. Crim. App. Jan. 27, 2021).

Petitioner was not entitled to post-conviction relief, given that his claim of ineffective assistance failed; counsel asked the trial court to instruct the jury that one man was petitioner's accomplice, but the trial court found that the jury should make that determination and the court affirmed that decision on direct appeal. Counsel chose a reasonable strategy that the court refused to second-guess. *Bland v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 36 (Tenn. Crim. App. Jan. 29, 2021).

Petitioner was not entitled to post-conviction relief, given that his claim of ineffective assistance failed; because one witness did not testify at the post-conviction hearing, petitioner could not show prejudice from counsel's decision not to call the witness, as the court could not speculate about whether the witness's testimony would have affected the outcome of the trial. *Bland v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 36 (Tenn. Crim. App. Jan. 29, 2021).

Petitioner was not entitled to post-conviction relief, given that his claim of ineffective assistance failed; counsel decided not to call one witness because he felt the witness would not support his defensive theory and the court would not second guess counsel's reasonable trial strategy. *Bland v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 36 (Tenn. Crim. App. Jan. 29, 2021).

Petition for post-conviction relief was properly denied because counsel did not render deficient performance for failing to object to the use of physical restraints, but, regardless, petitioner had not proven that any deficiency caused him prejudice; counsel argued for ex-

tremely minimal restraints and took efforts to conceal the restraints from the jury, and counsel discussed the issue with petitioner and recalled that he never voiced a disagreement to her about the use of ankle restraints. *Way v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 53 (Tenn. Crim. App. Feb. 11, 2021).

Petition for post-conviction relief was properly denied because counsel did not render deficient performance for failing to call exculpatory witnesses; counsel made strategic decisions with regard to the potential witnesses to which petitioner made her aware and called as a witness at trial the only person who claimed to know where petitioner was during the time of the burglary, and the other witnesses identified by petitioner could not have corroborated his alibi. *Way v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 53 (Tenn. Crim. App. Feb. 11, 2021).

It was proper to deny petitioner post-conviction relief because counsel was not deficient in his trial preparation; counsel and petitioner met numerous times at the jail and after petitioner was released on bond, counsel hired an investigator to interview witnesses and seek information about a possible third-party perpetrator, and counsel filed discovery motions and attempted unsuccessfully to have petitioner's confession suppressed. *Pence v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 82 (Tenn. Crim. App. Mar. 8, 2021).

It was proper to deny petitioner post-conviction relief because counsel was not deficient in his trial preparation; relative to the trial counsel's alleged failure to prepare petitioner to testify, the record was devoid of any evidence regarding counsel's discussions with petitioner since neither petitioner nor trial counsel were questioned at the post-conviction hearing about preparation to testify, or lack thereof. *Pence v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 82 (Tenn. Crim. App. Mar. 8, 2021).

It was proper to deny petitioner post-conviction relief because trial counsel was not deficient in his failure to provide audio recordings; trial counsel testified that he reviewed the discovery with petitioner a "multitude" of times, and the audio recording was played at the suppression hearing, where petitioner was present. *Pence v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 82 (Tenn. Crim. App. Mar. 8, 2021).

Record supported the post-conviction court's findings that trial counsel's investigation was not deficient because trial counsel hired a private investigator, and counsel spoke with the victims' mother on multiple occasions at the behest of petitioner; petitioner did not offer other evidence or other witnesses that trial counsel should have investigated. *Pence v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 82 (Tenn. Crim. App. Mar. 8, 2021).

Defendant was not entitled to post-conviction relief because, although trial counsel probably should have used information learned from an investigator to cross-examine a police lieutenant, defendant failed to present any evidence that the officer's answers would have led the trial court to grant defendant's motion to suppress. Similarly, although trial counsel should have timely filed a motion to sever, nothing in the record suggested that the trial court would have granted the motion even if it had been timely filed. *Smith v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 144 (Tenn. Crim. App. Apr. 13, 2021).

7. Guilty Plea.

In a petition for post-conviction relief, defendant's guilty plea was entered knowingly and voluntarily as the guilty plea colloquy showed that the trial court engaged defendant in an extensive series of questions to ensure that he understood the rights he was waiving by entering the guilty plea; and the post-conviction court determined that defendant was being untruthful in his assertion that the location where he was to serve his sentence was a material part of his guilty plea. *Aldridge v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 648 (Tenn. Crim. App. Sept. 29, 2020).

Defendant's petition for post-conviction relief was properly denied because defendant failed to show that his guilty plea was not knowingly, voluntarily, and intelligently made with the effective assistance of counsel as he stated that he was not forced to enter his plea and that no one had promised him anything; and he admitted that he never told the trial court at the guilty plea submission hearing that he felt pressured to accept the plea. *Griffin v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 762 (Tenn. Crim. App. Nov. 30, 2020).

Defendant was not entitled to post-conviction relief because defendant failed to establish any deficient performance by trial counsel that caused defendant to unknowingly or involuntarily plead guilty. Defendant's testimony established that defendants understood the sentence and that defendant was unable to appeal a suppression issue upon pleading guilty, while trial counsel's testimony established that counsel explained to defendant the sentence in the plea agreement and that defendant could not appeal the denial of a motion to suppress. *Smith v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 779 (Tenn. Crim. App. Dec. 4, 2020).

10. Denial of Relief.

Postconviction relief was erroneously denied because had if counsel adequately preserved a challenge to the admission of text messages between the victim and the inmate on direct appeal by including in the record the motion for discovery and the notebook compilation of the

text messages, the inmate would have successfully established that the State substantially prejudiced the inmate's case by failing to disclose the contents of the full extraction report and the notebook compilation containing over 6000 text messages and the post-conviction court erred in denying the inmate's petition. *Jernigan v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 557 (Tenn. Crim. App. Aug. 14, 2020).

Post-conviction court did not err in denying relief based on the alleged ineffective assistance of counsel because trial counsel's credited testimony was that he reviewed the discovery with the inmate, met with the inmate on numerous occasions, discussed trial strategy with the inmate, informed the inmate of sentencing range, and negotiated a plea agreement on behalf of the inmate, which would have resulted in a time-served sentence, but which the inmate declined accept. *Rodgers v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 51 (Tenn. Crim. App. Feb. 11, 2021).

13. Petition Properly Denied.

In a second-degree murder action, post-conviction relief was properly denied, as the inmate failed to show remand to the post-conviction court to call a witness was necessary since the inmate received a full and fair hearing under T.C.A. § 40-30-106(h); trial counsel made a reasonable strategic decision not to introduce character evidence about the victim because it would permit character evidence of the inmate to be admissible; and trial counsel made a reasonably based strategic decision not to call a distraught witness and believing that the witness's testimony would harm the inmate's case given her mental state. *Ferrell v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 593 (Tenn. Crim. App. Sept. 2, 2020).

Denial of postconviction relief was not erroneous, as the inmate failed to show that trial counsel was ineffective in failing to fully advise him of the plea deadline where the evidence presented at the hearing established that prior to the plea deadline, trial counsel met with the inmate, reviewed discovery with him, and discussed the State's plea offer and his potential sentencing exposure. Trial counsel testified that the inmate rejected the offer, and the post-conviction court found that he was aware of the plea deadline and the trial court's policy to reject plea agreements after the deadline expired. *Lindsey v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 618 (Tenn. Crim. App. Sept. 18, 2020).

Post-conviction court did not err in denying the inmate's petition for relief because the inmate failed to carry his burden to prove that trial counsel's representation was deficient, as the inmate failed to show what evidence trial counsel could have discovered if he had conducted further investigation, failed to show

prejudice from counsel's failure to facilitate the inmate's review of a recording, and failed to show how he could have achieved a different outcome on appeal had counsel showed the appellate brief before filing it. *Smith v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 628 (Tenn. Crim. App. Sept. 22, 2020).

In an action for murder, aggravated burglary and aggravated assault, the inmate's petition for post-conviction relief alleging ineffective assistance of counsel was properly denied because the inmate failed to prove that counsel rendered deficient performance where the record showed that counsel, an attorney with more than twenty years' experience in criminal defense, developed a trial strategy to challenge the inmate's mental capacity in light of the overwhelming evidence of his guilt and counsel's advice to testify was an informed and sound tactical decision based on adequate preparation. *Rivera v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 663 (Tenn. Crim. App. Oct. 9, 2020).

Post-conviction relief was properly denied where inmate understood that his guilty plea included that he would be subject to the sex offender registry, inmate failed to establish that mental health issues rendered his plea involuntary, and the inmate failed to prove that but for counsel's failure to interview witnesses, the inmate would not have entered a guilty plea. *Freemon v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 673 (Tenn. Crim. App. Oct. 13, 2020).

Circuit court properly denied defendant's motion for post-conviction relief because defendant failed to show that trial counsel was ineffective since counsel made tactical decisions not to introduce the subject photographs at trial so as not to emphasize the mother's testimony that the seven-year-old victim defecated on himself shortly after the photographs were taken, counsel was able to attempt to establish a positive image of the relationship between the victim and defendant through cross-examination of the victim's mother, and did not call a detective to testify about defendant's level of intoxication since counsel did not want to bring attention to defendant's confession. *Bogle v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 694 (Tenn. Crim. App. Oct. 26, 2020).

While the inmate established that trial counsel performed deficiently, post-conviction relief was proper denied because the inmate failed to prove prejudice, as the inmate failed to show that he could have succeeded on a motion to sever or a motion to suppress certain evidence, particularly in light of the appellate court's affirming on direct appeal the denial of co-defendant's suppression motion. The inmate also failed to provide any evidence of what information trial counsel could have discovered with proper communication and investigation. *Long v. State*, —

S.W.3d —, 2020 Tenn. Crim. App. LEXIS 726 (Tenn. Crim. App. Nov. 17, 2020).

Claim for postconviction relief failed because the inmate did not present proof at the post-conviction hearing, other than his own bare assertions, as to what the alleged witnesses counsel failed to present might have testified to had they been called at trial, and the evidence did not preponderate against the post-conviction court's findings that counsel was not deficient for failing to challenge the photo line-up because counsel testified at the hearing that he reviewed the photo line-up and found nothing suggestive about it. *Alexander v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 730 (Tenn. Crim. App. Nov. 17, 2020).

Post-conviction court did not err in denying the inmate's petition because the post-conviction court found that the inmate's testimony was not in the least credible and the inmate did not put forth any testimony that his attorney had coerced him in any way or allege that he was intoxicated prior to the post-conviction hearing. The testimony of both the inmate and trial counsel showed that trial counsel met with the inmate on multiple occasions and that trial counsel thoroughly explained the pros and cons of pleading guilty and proceeding to trial. *Sanders v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 773 (Tenn. Crim. App. Nov. 30, 2020).

Denial of the inmate's petition for post-conviction relief was proper, as the inmate failed to prove his claim regarding trial counsel coercing him into not testifying, as counsel testified that he advised the inmate not to testify because he viewed the victim's testimony as favorable to the inmate but that the ultimate decision belonged to the inmate. *Ball v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 815 (Tenn. Crim. App. Dec. 30, 2020).

Post-conviction relief was properly denied, as the post-conviction court's refusal to consider an expert's testimony did not result in the court erroneously crediting petitioner juvenile's statements to police and discrediting his post-

conviction testimony that he did not knowingly waive his rights before giving his statements, as the expert was unable to testify that sociological and psychological traits or characteristics affected the juvenile's ability to understand his rights or provide a voluntary statement to police and thus, her testimony was irrelevant. *Hampton v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 38 (Tenn. Crim. App. Jan. 29, 2021).

Denial of post-conviction relief was proper, as the inmate's claim that counsel was ineffective for failing to disclose the disposition of the minor co-defendant's case to the inmate, which would have influenced his decision to plead guilty, lacked merit because counsel's attempts to contact the minor co-defendant, whose address counsel was unable to obtain, fell within the wide range of professional assistance. *Taylor v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 50 (Tenn. Crim. App. Feb. 10, 2021).

Petition for post-conviction relief was properly denied because the trial court did not abuse its discretion in ordering the use of minimal physical restraints at trial; the trial court considered that petitioner had an extensive criminal history and a pending escape charge, it stressed the importance of concealing the shackles from the jury and had petitioner brought into the courtroom before the jury arrived, and petitioner was allowed to dress in civilian clothes for trial. *Way v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 53 (Tenn. Crim. App. Feb. 11, 2021).

Defendant was not entitled to post-conviction relief because defendant failed to prove that defendant received ineffective assistance of counsel at trial and on appeal, that the State of Tennessee committed prosecutorial misconduct during closing argument, and that the State withheld exculpatory evidence. Furthermore, even if defendant had not waived the claim that defendant was actually innocent, defendant failed to present any newly discovered evidence to support the claim. *French v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 103 (Tenn. Crim. App. Mar. 23, 2021).

40-30-106. Preliminary consideration.

NOTES TO DECISIONS

ANALYSIS

3. Waiver.
5. Previously Determined.

3. Waiver.

Petitioner did not raise an equal protection claim on direct appeal, and neither of the exceptions in the statute applied, and thus this issue was also waived. *Harris v. State*, —

S.W.3d —, 2020 Tenn. Crim. App. LEXIS 710 (Tenn. Crim. App. Nov. 3, 2020).

As petitioner raised an issue for the first time in his pro se petition for post-conviction relief, the issue was waived. *Jones v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 767 (Tenn. Crim. App. Nov. 30, 2020).

Petitioner's "free-standing" claim that his right to due process was violated when he was ordered to wear leg restraints was waived as a

ground for post-conviction relief because it was not presented on direct appeal. *Way v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 53 (Tenn. Crim. App. Feb. 11, 2021).

With regard to petitioner's claim that counsel failed to obtain his medical records, petitioner did not raise the claim in his post-conviction petition and, therefore, waived it on appeal. *Way v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 53 (Tenn. Crim. App. Feb. 11, 2021).

40-30-110. Hearing.

5. Previously Determined.

Because the issue of whether defendant's Sixth Amendment rights were violated when the cellmate, acting as a State agent, interrogated him had been previously determined, defendant was not entitled to relief. *Frelix v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 653 (Tenn. Crim. App. Oct. 5, 2020).

NOTES TO DECISIONS

ANALYSIS

1. Guilty Plea.
6. Denial of Relief.
7. Ineffective Assistance of Counsel.
10. Petition Properly Denied.
15. Effective Assistance of Counsel.

1. Guilty Plea.

In a petition for post-conviction relief, defendant's guilty plea was entered knowingly and voluntarily as the guilty plea colloquy showed that the trial court engaged defendant in an extensive series of questions to ensure that he understood the rights he was waiving by entering the guilty plea; and the post-conviction court determined that defendant was being untruthful in his assertion that the location where he was to serve his sentence was a material part of his guilty plea. *Aldridge v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 648 (Tenn. Crim. App. Sept. 29, 2020).

Defendant's petition for post-conviction relief was properly denied because defendant failed to show that his guilty plea was not knowingly, voluntarily, and intelligently made with the effective assistance of counsel as he stated that he was not forced to enter his plea and that no one had promised him anything; and he admitted that he never told the trial court at the guilty plea submission hearing that he felt pressured to accept the plea. *Griffin v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 762 (Tenn. Crim. App. Nov. 30, 2020).

Defendant's petition for post-conviction relief was properly denied because he pled guilty knowingly and voluntarily because he was not incompetent; trial counsel went over defendant's plea petition with him, she explained his rights to him, including his right to a jury trial, and he understood those rights; defendant affirmed that he was pleading guilty voluntarily, that he was entering his plea without being under the influence of alcohol or drugs, and that he was pleading guilty free of any force or threats; and defendant stated that he under-

stood what he was doing when he pled guilty. *Halbrooks v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 813 (Tenn. Crim. App. Nov. 30, 2020).

Record supported the post-conviction court's finding that petitioner entered knowing and voluntary guilty pleas because the trial court and trial counsel explained the nature and consequences of petitioner's guilty plea; at the time petitioner entered his guilty pleas, he understood he would serve a nine-year sentence for the drug charges, which would run concurrently with his pending aggravated assault charges. *Woodruff v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 48 (Tenn. Crim. App. Feb. 10, 2021).

6. Denial of Relief.

Although defendant asserted that remand of defendant's case was appropriate so that defendant could present evidence identified at the post-conviction hearing, a remand to the post-conviction court for another evidentiary hearing was not warranted as the post-conviction court held an evidentiary hearing, defendant was afforded every opportunity to present evidence and argument at the hearing, and defendant was not entitled to post-conviction relief as defendant did not demonstrate that defendant received ineffective assistance of counsel. *Moss v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 753 (Tenn. Crim. App. Nov. 25, 2020).

Petitioner was sitting on the couch in his home when he spoke with police and gave the non-inculpatory statement that was used at trial, plus he testified at trial that at the time he spoke with police, he did not think police had an arrest warrant or probable cause to arrest him; he did not show that he was subjected to custodial interrogation requiring the police to advise him of his Miranda rights, and his claim for post-conviction relief was properly denied. *McKaughan v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 21 (Tenn. Crim. App. Jan. 13, 2021).

Petitioner presented no proof that he suffered a Gerstein violation, nor did he establish any connection between his detention and the evidence adduced at trial; therefore, he failed to establish a Fourth Amendment violation and he was not entitled to post-conviction relief. *McKaughan v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 21 (Tenn. Crim. App. Jan. 13, 2021).

7. Ineffective Assistance of Counsel.

Trial court properly denied defendant's petition for post-conviction relief based on the ineffectiveness of his trial and appellate counsel for failing to object to or raise the improper statements by the prosecutor during closing and rebuttal argument because trial counsel had already lodged six objections during the prosecutor's closing arguments before the prosecutor made the statement at issue—that trial counsel failed to mention the victim's name during closing argument—and trial counsel was not deficient for making a strategic decision to only raise the issues he reasonably believed might have succeeded on appeal. *Branam v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 485 (Tenn. Crim. App. July 16, 2020).

Inmate was not entitled to post-conviction relief based on ineffective assistance when the inmate thought a law enforcement officer guaranteed the inmate probation in exchange for the inmate's assistance, and counsel did not ensure the inmate understood a plea agreement, because (1) the inmate understood a guilty plea and the plea's consequences, including a lack of guaranteed probation, and (2) counsel credibly testified the plea agreement did not guarantee a sentence, and counsel said counsel advised the inmate the inmate faced mandatory incarceration and was unlikely to be immediately released thereafter. *Cole v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 486 (Tenn. Crim. App. July 16, 2020).

Inmate was not entitled to post-conviction relief for counsel's failure to object to a victim's granddaughter's lay testimony because (1) the witness could describe what the witness saw during the victim's forensic examination, and (2) the witness's use of common medical terms did not elevate the witness's testimony to that of a medical expert. *Denton v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 487 (Tenn. Crim. App. July 16, 2020).

Inmate was not entitled to post-conviction relief for counsel's failure to object to a prosecutor's closing argument because counsel's decision was strategic. *Denton v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 487 (Tenn. Crim. App. July 16, 2020).

Inmate was not entitled to post-conviction relief based on counsel's failure to present an expert critical of the State's expert's failure to photograph a forensic examination because

such testimony by a defense expert would not have changed the trial's result, as (1) this expert could not state defendant did not penetrate the victim and could not have determined from photographs if penetration occurred, and (2) evidence of penetration was overwhelming. *Denton v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 487 (Tenn. Crim. App. July 16, 2020).

In an aggravated sexual battery case, trial counsel was not ineffective for failing to investigate or call two witnesses because the testimony of the witnesses at the post-conviction hearing only had bearing on defendant's general character and on his back injury; at trial, defendant's mother, sister, and wife gave similar testimony about his character and injury; the witnesses actually presented at trial were able to give more detailed testimony and also had testimony that was relevant to defendant's relationship with the child victim; and there was no reasonable probability that, had the omitted witnesses been presented at trial, the result of the proceeding would have been different. *Davis v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 512 (Tenn. Crim. App. July 27, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 537 (Tenn. Oct. 7, 2020).

In an aggravated sexual battery case, trial counsel was not ineffective for failing to present evidence of defendant's erectile dysfunction because counsel testified that she felt it was strategically necessary to present proof that defendant was sexually active with the victim's mother as she felt that the defense needed to provide an explanation for the child victim's sexual knowledge as an alternative to the explanation that she gained the knowledge through abuse by defendant; and the evidence would have been in conflict with defendant's own testimony. *Davis v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 512 (Tenn. Crim. App. July 27, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 537 (Tenn. Oct. 7, 2020).

Inmate's claim that trial counsel was ineffective because he did not explain the State's evidence against him, the theory of criminal responsibility, and the inmate's options regarding a plea bargain lacked merit because trial counsel testified he met with the inmate numerous times and a Spanish-speaking investigator accompanied him to every meeting, and trial counsel testified that he explained the facts of the case and the State's theory to the inmate and that the State did not make a plea offer. *Conde-Valentino v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 543 (Tenn. Crim. App. Aug. 6, 2020).

Trial counsel was not ineffective for failing to present evidence at trial that the inmate did not speak English, which would have shown that the conversations he allegedly had with an acquaintance were linguistically impossible, because the acquaintance testified that she

spoke English with the inmate and a codefendant and that they spoke English too. *Conde-Valentino v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 543 (Tenn. Crim. App. Aug. 6, 2020).

Defendant's petition for post-conviction relief was properly denied because counsel was not ineffective in allowing for the relationship between defendant and counsel to deteriorate resulting in poor communication because counsel testified that, despite his difficulties with defendant, he did not believe that communication between them had completely broken down and they were able to develop a strategy for trial; and counsel presented the defense that defendant chose to present. *Halliburton v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 554 (Tenn. Crim. App. Aug. 13, 2020).

Defendant's petition for post-conviction relief was properly denied because counsel was not ineffective in failing to keep defendant's mental health expert in the courtroom to observe his testimony and that of the State's rebuttal expert witness as defendant's family would have incurred an additional charge for the expert's continued presence in the courtroom; and counsel consulted with the expert ahead of time about his cross-examination of the State's expert based on her anticipated testimony. *Halliburton v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 554 (Tenn. Crim. App. Aug. 13, 2020).

Defendant's petition for post-conviction relief was properly denied as counsel was not ineffective for failing to communicate adequately with defendant because the post-conviction court accredited trial counsel's testimony that he met with defendant when he came to court, that defendant had a copy of the discovery materials at every meeting, and that defendant was knowledgeable about his case; and, although defendant contended that trial counsel did not discuss a trial strategy with him, defendant did not suggest what strategy trial counsel should have used to change the outcome of his case. *Williams v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 560 (Tenn. Crim. App. Aug. 14, 2020).

Denial of post-conviction relief was appropriate because defendant failed to demonstrate deficiency or prejudice with regard to defendant's claims of ineffective assistance of counsel as defendant failed to establish a reasonable probability that the outcome of the proceeding would have changed if defendant's trial counsel had performed the acts which defendant claimed were necessary for counsel to have performed. *Davis v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 576 (Tenn. Crim. App. Aug. 25, 2020).

Defendant was not entitled to post-conviction relief because counsel's testimony established that upon learning that counsel had a conflict of interests related to two of defendant's four

cases, counsel notified defendant of the conflict and told defendant that counsel could not represent defendant in those cases. When defendant opted to retain a second counsel for the cases in which counsel could not represent defendant, counsel was not involved with those cases and did not participate in the plea negotiations involving all four cases. *Currie v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 611 (Tenn. Crim. App. Sept. 17, 2020).

Petitioner failed to establish deficient representation and prejudice and was therefore not entitled to post-conviction relief; counsel was able to negotiate a plea deal reducing petitioner's sentence from eight years to four, which petitioner declined, and he failed to present any proof establishing that the State would have made an offer to reduce the charges to a misdemeanor. *Delosh v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 631 (Tenn. Crim. App. Sept. 23, 2020).

Search of petitioner's property was legal because he was on parole at the time of the search, and trial counsel testified that he did not object to the legality of the search because it was lawful; ineffective assistance was not shown and petitioner was not entitled to post-conviction relief. *Delosh v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 631 (Tenn. Crim. App. Sept. 23, 2020).

Petitioner admitted he did not ask counsel to interview party attendees until the last day of trial and conceded counsel did not have enough time to investigate, plus petitioner failed to produce any witnesses at the post-conviction hearing; thus, ineffective assistance was not shown and petitioner was not entitled to post-conviction relief. *Delosh v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 631 (Tenn. Crim. App. Sept. 23, 2020).

Petitioner alleged that counsel was ineffective for failing to retain an expert to examine the drug and physical evidence found at the crime scene, but as petitioner failed to call an expert witness at the post-conviction hearing, he was not entitled to relief; counsel testified he made a strategic decision not to call an expert or file a motion regarding the loss of evidence and ineffective assistance was not shown. *Delosh v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 631 (Tenn. Crim. App. Sept. 23, 2020).

Petitioner testified he recalled hearing a juror claim they belonged to the same gym as the prosecutor, but petitioner failed to present any proof during the post-conviction hearing as to which juror he was referring or how he was prejudiced; ineffective assistance was not shown for failing to challenge the juror and petitioner was not entitled to relief. *Delosh v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 631 (Tenn. Crim. App. Sept. 23, 2020).

Counsel argued the State's evidence was at most sufficient to show methamphetamine use,

and insufficient to show the petitioner was manufacturing methamphetamine; the post-conviction court accredited counsel's decisions regarding the appropriate defense for petitioner's case, counsel's actions were not deficient, and petitioner was not entitled to post-conviction relief. *Delosh v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 631 (Tenn. Crim. App. Sept. 23, 2020).

Petitioner failed to show ineffective assistance of counsel and thus he was not entitled to post-conviction relief; while trial counsel admitted he spent less time discussing trial preparation with petitioner than he did plea negotiations and preparing the case for trial, this conduct was tactical given petitioner's status as a career offender and because he was incarcerated at the time, plus he did not show a reasonable probability that the result would have been different had counsel acted otherwise. *Delosh v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 631 (Tenn. Crim. App. Sept. 23, 2020).

Petitioner was questioned about a theft conviction and the State gave counsel notice, making the State's impeachment evidence admissible; petitioner failed to show that an objection by counsel would have resulted in the exclusion of the evidence, plus the record reflected an abundance of evidence on which a jury could have convicted him even with counsel's failure to object. Ineffective assistance was not shown and petitioner was not entitled to relief. *Delosh v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 631 (Tenn. Crim. App. Sept. 23, 2020).

Counsel testified he did not want the jury to view an investigator as an expert and strategically chose not to have him qualified as an expert, which was a tactical decision; petitioner did not provide proof at the post-conviction hearing to establish that counsel's decision was objectively unreasonable or that he was prejudiced, such that ineffective assistance was not shown and post-conviction relief was not available. *Delosh v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 631 (Tenn. Crim. App. Sept. 23, 2020).

Testimony was sufficient to authenticate the photographs presented at trial and establish the photographs depicted the evidence found on petitioner's property; there was not a chain of custody issue regarding the photographs, counsel was not ineffective, and petitioner was not entitled to relief. *Delosh v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 631 (Tenn. Crim. App. Sept. 23, 2020).

Defendant was not entitled to postconviction relief because defendant failed to prove that counsel at the suppression hearing was ineffective for failing to put on evidence concerning defendant's alleged intoxication when making statements to the police; that counsels at trial were ineffective for failing to communicate with defendant, review the suppression hearing

transcript, and present a cohesive theory of defense; and that appellate counsel was ineffective for failing to include a transcript from the suppression hearing in the record. *Buford v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 630 (Tenn. Crim. App. Sept. 24, 2020).

Although defendant claimed that defendant's trial counsel denied defendant of defendant's fundamental right to testify, defendant failed to prove that counsel's performance as to this issue was deficient or prejudicial because, although counsel encouraged defendant not to testify, it was ultimately defendant's decision to voluntarily and personally waive the right to testify. *Alvarado v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 638 (Tenn. Crim. App. Sept. 25, 2020).

Defendant failed to prove that defendant's trial counsel was ineffective for failing to present witnesses and evidence in defendant's favor as counsel testified that counsel interviewed proposed witnesses, but did not believe that they could provide a solid alibi, and defendant did not establish prejudice in that defendant failed to present the witnesses at a post-conviction hearing. Defendant also failed to show how counsel was deficient in failing to present defendant's employment records and how defendant was prejudiced by this decision. *Alvarado v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 638 (Tenn. Crim. App. Sept. 25, 2020).

Trial counsel was not ineffective because, during the guilty plea colloquy, counsel advised the court that he would be recommending defendant for placement at a special needs facility, and the trial court noted the recommendation on the judgment form; and counsel testified at the post-conviction hearing that he neither misled defendant into believing nor guaranteed to defendant that he would serve his sentence at the special needs facility. *Aldridge v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 648 (Tenn. Crim. App. Sept. 29, 2020).

Defendant's petition for post-conviction relief was properly denied as trial counsel was not ineffective in failing to file a motion to suppress because nothing in the letters from defendant's cellmate indicated that he was being directed to act or compensated for eliciting information from defendant; and the appellate court had all the existing evidence pertinent to any agreement made by the government, acting through a detective, with the cellmate when it concluded that the cellmate was not a State agent. *Frelx v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 653 (Tenn. Crim. App. Oct. 5, 2020).

In an action for murder, aggravated burglary and aggravated assault, the inmate's petition for post-conviction relief alleging ineffective assistance of counsel was properly denied because the inmate failed to prove that counsel rendered deficient performance where the record showed that counsel, an attorney with more

than twenty years' experience in criminal defense, developed a trial strategy to challenge the inmate's mental capacity in light of the overwhelming evidence of his guilt and counsel's advice to testify was an informed and sound tactical decision based on adequate preparation. *Rivera v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 663 (Tenn. Crim. App. Oct. 9, 2020).

Defendant failed to prove that defendant received ineffective assistance of counsel regarding defendant's guilty plea because defendant failed to show that counsel was deficient in failing to properly investigate the case, was deficient as to discovery, was deficient in not meeting with defendant at the jail, was deficient in failing to adequately meet with defendant, and was deficient in advising defendant as to sentencing. Furthermore, defendant failed to prove that the guilty plea was unknowingly or involuntarily entered because of counsel. *Mitchell v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 682 (Tenn. Crim. App. Oct. 16, 2020).

Defendant was not entitled to post-conviction relief because any error by trial counsel in failing to object to the testimony of a witness, who was responsible for monitoring inmate phone calls for the sheriff's office, regarding the recordings of defendant's phone calls from jail on the ground that the State of Tennessee had not qualified the witness as an expert in voice recognition was harmless as defendant readily admitted under cross-examination at trial that it was defendant's voice on the calls. *Harris v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 683 (Tenn. Crim. App. Oct. 16, 2020).

Defendant was not entitled to post-conviction relief because defendant did not prove that trial counsel was ineffective by not calling witness as defendant failed to present the proposed witnesses or a mental health expert at the post-conviction hearing. Defendant also failed to establish that trial counsel was ineffective in failing to present a mental health defense as there was no proof at the post-conviction hearing to establish if or how defendant's diagnosis of generalized anxiety disorder impacted the offense. *Harris v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 683 (Tenn. Crim. App. Oct. 16, 2020).

Defendant was not entitled to post-conviction relief because defendant failed to prove resulting prejudice from defendant's ineffective assistance of counsel claims based on trial counsel failing to subpoena alibi witnesses to testify, failing to present video evidence to show that defendant was not at the scene of the crime, and failing to challenge an allegedly biased juror. Defendant failed to show prejudice as defendant did not present the alibi witnesses to testify, show the video evidence, or call the juror at the evidentiary hearing. *Lee v. State*, —

S.W.3d —, 2020 Tenn. Crim. App. LEXIS 706 (Tenn. Crim. App. Oct. 30, 2020).

Defendant was not entitled to post-conviction relief because defendant failed to prove that defense counsel did not allow defendant to effectively participate in defendant's own defense. Furthermore, counsel was not ineffective for failing to file a motion to sever the child neglect, aggravated child abuse, and felony murder counts against defendant for separate trials because the cases were mandatorily joined as the incidents were part of a single continuing episode of multiple abuse of the victim over the course of days. *Demeza v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 707 (Tenn. Crim. App. Oct. 30, 2020).

Jury was able to hear a witness's testimony directly and thus any failure to admit the witness's letter was of no consequence because the result would have been the same with or without the letter as substantive evidence; ineffective assistance was not shown and petitioner was not entitled to post-conviction relief. *Marsh v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 727 (Tenn. Crim. App. Nov. 16, 2020).

Petitioner was not entitled to post-conviction relief as he failed to show ineffective assistance of counsel; he did not present any evidence that counsel's failure to have bags of drugs tested for DNA and fingerprint evidence was objectively unreasonable, plus he stipulated that DNA and fingerprint evidence would not disprove the State's theory of constructive possession and he did not present the results of any such testing at the post-conviction hearing. *Marsh v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 727 (Tenn. Crim. App. Nov. 16, 2020).

Defendant was not entitled to post-conviction relief because defendant failed to demonstrate that defendant received ineffective assistance of counsel as defendant failed to demonstrate that defendant was prejudiced by counsel's failing to lodge a formal objection to the jury's late-night deliberations or to call a particular witness. Furthermore, defendant failed to demonstrate that counsel was deficient or that defendant was prejudiced by any deficiency in defendant's communications with counsel to prepare a defense. *Walls v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 752 (Tenn. Crim. App. Nov. 25, 2020).

Defendant's petition for post-conviction relief was properly denied because trial counsel advised defendant of his right to testify, and he voluntarily decided to waive his right. *Clymer v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 757 (Tenn. Crim. App. Nov. 30, 2020).

In a rape of a child case, defendant's petition for post-conviction relief was properly denied because trial counsel was not ineffective for failing to obtain expert and rebuttal witnesses to testify on defendant's behalf as counsel explained that expert testimony regarding the

credibility of the victim would have been damaging to defendant's case and likely inadmissible; and, although defendant testified trial counsel should have hired an expert to conduct a psychosexual examination regarding his propensity to commit sexual assault and had the victim's credibility psychologically evaluated, he did not present any experts during the post-conviction hearing. *Clymer v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 757 (Tenn. Crim. App. Nov. 30, 2020).

Defendant's petition for post-conviction relief was properly denied because trial counsel was not ineffective for failing to file a motion to suppress his pre-arrest interview with law enforcement as the interview occurred in defendant's home; and he was not in custody at the time because he failed to provide proof that the detectives' words or conduct amounted to the equivalent of a custodial arrest, and he failed to provide evidence to show that a reasonable person would not have felt free to end the interview. *Clymer v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 757 (Tenn. Crim. App. Nov. 30, 2020).

Defendant's petition for post-conviction relief was properly denied because trial counsel was not ineffective for failing to prepare a visual aid of the crime scene as, during cross-examination of the victim at trial, trial counsel had the victim draw a diagram of the home and used the diagram during closing arguments to show the inconsistencies with the victim's testimony; and defendant failed to present a three-dimensional model of the home that could have been used at trial, and failed to show how a different visual aid would have benefitted his case or changed the outcome of the trial. *Clymer v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 757 (Tenn. Crim. App. Nov. 30, 2020).

Defendant's petition for post-conviction relief was properly denied because he did not show that, but for counsel's deficient representation, he would have accepted the plea offer from the State as he testified he would not have accepted any offer as he was innocent; and he failed to establish that the trial court would have accepted the terms of the offer. *Clymer v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 757 (Tenn. Crim. App. Nov. 30, 2020).

Defendant's petition for post-conviction relief was properly denied as trial counsel was not ineffective for failing to object to the victim's uncle's testimony that defendant and victim were in bed together on the day of the charged offense because the State did not use that testimony at trial as character or propensity evidence as the testimony appeared to have been offered to provide the jury with a complete version of the events of that day; and counsel did not consider objecting to the testimony as it was admissible. *Clymer v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 757 (Tenn. Crim. App. Nov. 30, 2020).

Defendant's petition for post-conviction relief was properly denied as trial counsel was not ineffective for failing to file a motion to suppress the jail calls with his mother because, while counsel did not file a motion to suppress the calls, he filed a motion in limine to exclude the portions of the calls during which defendant made reference to what he said in the police interrogation that had been suppressed pursuant to an earlier suppression motion filed by initial counsel; and he failed to prove that a motion to suppress would have been granted. *Griffin v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 762 (Tenn. Crim. App. Nov. 30, 2020).

Defendant's petition for post-conviction relief was properly denied as trial counsel was not ineffective for failing to file a motion to continue to have more time to consider and research the issue of the jail calls because he did not demonstrate that a motion to continue would have been granted; he did not show or allege in his brief how a continuance or additional research would have changed the outcome of his case; and the post-conviction court accredited trial counsel's testimony that he was prepared for trial. *Griffin v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 762 (Tenn. Crim. App. Nov. 30, 2020).

Petitioner failed to show ineffective assistance of counsel for failure to request merging his convictions and thus he was not entitled to postconviction relief; because petitioner's sentences were already running concurrently, merging the convictions did not affect the length of his sentence, plus the appropriate remedy for a double jeopardy violation would be merger of the convictions, which the postconviction court already granted. *Jones v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 767 (Tenn. Crim. App. Nov. 30, 2020).

Defendant was not entitled to post-conviction relief because defendant failed to establish any deficient performance by trial counsel that caused defendant to unknowingly or involuntarily plead guilty. Defendant's testimony established that defendants understood the sentence and that defendant was unable to appeal a suppression issue upon pleading guilty, while trial counsel's testimony established that counsel explained to defendant the sentence in the plea agreement and that defendant could not appeal the denial of a motion to suppress. *Smith v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 779 (Tenn. Crim. App. Dec. 4, 2020).

Defendant was not entitled to post-conviction relief because defendant failed to prove that defense counsel provided ineffective assistance by failing to present witnesses to support a heat of passion defense and by failing to communicate defendant's acceptance of an alleged plea offer to the State of Tennessee. *Maraschiello v.*

State, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 780 (Tenn. Crim. App. Dec. 4, 2020).

Defendant failed to show that trial counsel was deficient in failing to present evidence that defendant was too intoxicated to form the requisite intent for first degree premeditated murder because post-conviction counsel did not introduce into evidence alleged bank records showing alcohol purchases and prescriptions and defendant did not have any witnesses testify about alleged drugging of defendant. Regardless, in the hours leading up to the victim's death, defendant made several declarations of intent to kill the victim. *Hudgins v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 803 (Tenn. Crim. App. Dec. 22, 2020).

Defendant failed to prove that trial counsel was ineffective for not filing a recusal motion, for the manner in which counsel handled motions and hearings to suppress, for the failure to move to sever the aggravated sexual battery and especially aggravated sexual exploitation of a minor offenses for trial, for the failure to challenge the State of Tennessee's election of offenses, for the failure to argue that the State did not establish venue, and for the failure to raise amendment of the indictment as an issue in a motion for new trial. *Wilson v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 806 (Tenn. Crim. App. Dec. 22, 2020).

Defendant was not entitled to post-conviction relief because defendant failed to prove that appellate counsel was ineffective in that appellate counsel explained that counsel chose to raise the issues which counsel believed had the best chance of success on appeal and that counsel did not raise suppression issues or lack of the suppression hearing transcripts as counsel did not believe that those issues stood any chance of success. *Wilson v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 806 (Tenn. Crim. App. Dec. 22, 2020).

Defendant's second and third trial counsel were not ineffective for not procuring a mental evaluation to determine his competence because defendant was not credible when he testified that he was incompetent; he did not present any evidence regarding his competence at the evidentiary hearing; a doctor did not state that he was incompetent; and all three of his trial attorneys testified that nothing indicated he was incompetent. *Halbrooks v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 813 (Tenn. Crim. App. Nov. 30, 2020).

Third trial counsel was not ineffective for advising defendant to plead guilty even though she knew that second trial counsel had filed a motion to suppress because the post-conviction court found that there was no reasonable probability that the trial court would have granted the motion to suppress; and, even if the evidence was suppressed, defendant still would have been facing a trial for a Class B felony, which had a range of punishment of 20-30

years, but third trial counsel procured a plea offer of five years to be served on supervised probation for the firearms offense, and the State agreed to dismiss the remaining charges. *Halbrooks v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 813 (Tenn. Crim. App. Nov. 30, 2020).

Victim testified that the kissing occurred prior to the date of the aggravated sexual battery as stated in the indictment, and State repeatedly mentioned the date of the offense and emphasized that the charges related to the allegations of fondling the victim underneath the blanket, such that no election of offenses was necessary; thus, counsel was not deficient for failing to ask for an election and petitioner was not entitled to post-conviction relief. *McKaughan v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 21 (Tenn. Crim. App. Jan. 13, 2021).

Post-conviction court found that trial counsel was deficient when he failed to sufficiently cross-examine a witness, but the court also found that other testimony at the post-conviction hearing was not credible and the witness had no motive to coach the victim to make the accusations; the post-conviction court properly found that petitioner failed to prove that he was prejudiced by any alleged deficiency and thus was not entitled to post-conviction relief. *McKaughan v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 21 (Tenn. Crim. App. Jan. 13, 2021).

Photographs taken during the victim's forensic examination were properly used at trial to demonstrate why the doctor reached her conclusions regarding the victim's injuries; counsel had filed a motion in limine to exclude the photographs and was not deficient, such that petitioner was not entitled to post-conviction relief. *McKaughan v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 21 (Tenn. Crim. App. Jan. 13, 2021).

Post-conviction court found no evidence of prosecutorial misconduct and that trial counsel was not deficient for failing to challenge any alleged prosecutorial misconduct; the record did not preponderate against this finding and petitioner was not entitled to relief. *McKaughan v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 21 (Tenn. Crim. App. Jan. 13, 2021).

Petitioner was not entitled to post-conviction relief based on ineffective assistance of counsel; a police officer testified that petitioner's mother gave the officers permission to enter the house in which she lived with petitioner, and he did not call any witnesses or offer any evidence at the post-conviction hearing to show that the search was illegal, nor did he show prejudice. *McKaughan v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 21 (Tenn. Crim. App. Jan. 13, 2021).

Trial court found that multiple layers of hearsay might make petitioner's potential testimony inadmissible and trial counsel did not call petitioner to make an offer of proof after the trial court's warning, and at the post-conviction hearing, petitioner did not specify what his offer of proof would have been or explain how any exceptions to hearsay applied to make the evidence admissible; ineffective assistance was not shown and petitioner was not entitled to relief. *McKaughan v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 21 (Tenn. Crim. App. Jan. 13, 2021).

Petitioner failed to establish that granting yet another continuance would have benefitted him, and thus he was not entitled to post-conviction relief; despite repeated continuances, he waited until the day before the hearing to complain about his inability to secure the attendance of appellate counsel, an out-of-state resident, and while neither petitioner nor post-conviction counsel requested that a subpoena be issued for appellate counsel, the post-conviction court correctly stated that it did not have the authority to issue such a subpoena. *McKaughan v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 21 (Tenn. Crim. App. Jan. 13, 2021).

At the time of the plea hearing, trial counsel's advice was reasonable and based upon the evidence available to trial counsel at the time, plus petitioner never affirmatively testified that he would have accepted the plea offer; thus, he was not entitled to postconviction relief based on ineffective assistance of counsel. *McKaughan v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 21 (Tenn. Crim. App. Jan. 13, 2021).

Defendant was not entitled to post-conviction relief because defendant failed to show that trial counsel was in any way deficient in counsel's performance or that defendant was prejudiced as the result of any alleged deficiency on the part of counsel. Furthermore, trial counsel's testimony, which was implicitly accredited by the post-conviction court, established that counsel reviewed discovery, investigated and discussed the case with defendant, and made well-informed strategic decisions about witnesses and trial strategy. *Watkins v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 32 (Tenn. Crim. App. Jan. 27, 2021).

Petitioner was not entitled to post-conviction relief, given that his claim of ineffective assistance failed; counsel decided not to call one witness because he felt the witness would not support his defensive theory and the court would not second guess counsel's reasonable trial strategy. *Bland v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 36 (Tenn. Crim. App. Jan. 29, 2021).

Petitioner was not entitled to post-conviction relief, given that his claim of ineffective assistance failed; counsel asked the trial court to

instruct the jury that one man was petitioner's accomplice, but the trial court found that the jury should make that determination and the court affirmed that decision on direct appeal. Counsel chose a reasonable strategy that the court refused to second-guess. *Bland v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 36 (Tenn. Crim. App. Jan. 29, 2021).

Petitioner was not entitled to post-conviction relief, given that his claim of ineffective assistance failed; because one witness did not testify at the post-conviction hearing, petitioner could not show prejudice from counsel's decision not to call the witness, as the court could not speculate about whether the witness's testimony would have affected the outcome of the trial. *Bland v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 36 (Tenn. Crim. App. Jan. 29, 2021).

It was proper to deny petitioner post-conviction relief because trial counsel was not deficient in his failure to provide audio recordings; trial counsel testified that he reviewed the discovery with petitioner a "multitude" of times, and the audio recording was played at the suppression hearing, where petitioner was present. *Pence v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 82 (Tenn. Crim. App. Mar. 8, 2021).

It was proper to deny petitioner post-conviction relief because counsel was not deficient in his trial preparation; relative to the trial counsel's alleged failure to prepare petitioner to testify, the record was devoid of any evidence regarding counsel's discussions with petitioner since neither petitioner nor trial counsel were questioned at the post-conviction hearing about preparation to testify, or lack thereof. *Pence v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 82 (Tenn. Crim. App. Mar. 8, 2021).

Record supported the post-conviction court's findings that trial counsel's investigation was not deficient because trial counsel hired a private investigator, and counsel spoke with the victims' mother on multiple occasions at the behest of petitioner; petitioner did not offer other evidence or other witnesses that trial counsel should have investigated. *Pence v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 82 (Tenn. Crim. App. Mar. 8, 2021).

It was proper to deny petitioner post-conviction relief because counsel was not deficient in his trial preparation; counsel and petitioner met numerous times at the jail and after petitioner was released on bond, counsel hired an investigator to interview witnesses and seek information about a possible third-party perpetrator, and counsel filed discovery motions and attempted unsuccessfully to have petitioner's confession suppressed. *Pence v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 82 (Tenn. Crim. App. Mar. 8, 2021).

Defendant was not entitled to post-conviction relief because, although trial counsel probably

should have used information learned from an investigator to cross-examine a police lieutenant, defendant failed to present any evidence that the officer's answers would have led the trial court to grant defendant's motion to suppress. Similarly, although trial counsel should have timely filed a motion to sever, nothing in the record suggested that the trial court would have granted the motion even if it had been timely filed. *Smith v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 144 (Tenn. Crim. App. App. 13, 2021).

10. Petition Properly Denied.

Denial of post-conviction relief was appropriate because defendant failed to show that trial counsel was deficient or that defendant was prejudiced by any deficiency as the post-conviction court accredited the testimony of defendant's counsel and the favorable sentence defendant received. Defendant also failed to show that defendant did not plead guilty knowingly or understandingly as the trial court confirmed that defendant went over the plea petition with counsel, understood the petition, and signed the petition freely and voluntarily. *Alexander v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 579 (Tenn. Crim. App. Aug. 25, 2020).

Defendant was not entitled to relief because defendant's plea was knowing and voluntary as a thorough plea colloquy was conducted in defendant's case; defendant affirmed under oath that defendant understood the rights defendant was waiving and the consequences of the plea and that defendant was satisfied with counsel's representation; and defendant testified that defendant understood the plea agreement and was happy with it. Counsel also obtained and discussed the State of Tennessee's evidence with defendant and obtained a favorable sentence. *Harris v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 668 (Tenn. Crim. App. Oct. 13, 2020).

Post-conviction court did not err in finding that the inmate knowingly and voluntarily entered his guilty pleas after finding that trial counsel warned the inmate that in order to appeal the denial of his first motion to suppress, he would have to proceed to trial and the inmate acknowledged that he was waiving the right to have his second motion to suppress heard and asserted that he was freely and voluntarily pleading guilty. *Watson v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 814 (Tenn. Crim. App. Dec. 30, 2020).

Denial of postconviction relief was proper, as the inmate failed to show that co-counsel was ineffective on appeal by waiving the issue of the trial court's allowing hearsay testimony from an investigator regarding how the inmate became aware of the sexual abuse allegations because trial counsel could not have submitted any convincing authority to counter its ruling at trial that the testimony was not offered for

the truth of the matter asserted and there was no prejudice to the inmate. *Pillars v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 6 (Tenn. Crim. App. Jan. 7, 2021).

Petition for post-conviction relief was properly denied because the trial court did not abuse its discretion in ordering the use of minimal physical restraints at trial; the trial court considered that petitioner had an extensive criminal history and a pending escape charge, it stressed the importance of concealing the shackles from the jury and had petitioner brought into the courtroom before the jury arrived, and petitioner was allowed to dress in civilian clothes for trial. *Way v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 53 (Tenn. Crim. App. Feb. 11, 2021).

Court of criminal appeals concluded that the evidence supported the post-conviction court's findings, and that petitioner was not entitled to relief. The post-conviction court expressly accredited counsel's testimony that petitioner did not ask for more time to evaluate the plea agreement, which was one that he himself proposed to the State. *Baker v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 97 (Tenn. Crim. App. Mar. 17, 2021).

Defendant was not entitled to post-conviction relief because defendant failed to prove that defendant received ineffective assistance of counsel at trial and on appeal, that the State of Tennessee committed prosecutorial misconduct during closing argument, and that the State withheld exculpatory evidence. Furthermore, even if defendant had not waived the claim that defendant was actually innocent, defendant failed to present any newly discovered evidence to support the claim. *French v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 103 (Tenn. Crim. App. Mar. 23, 2021).

15. Effective Assistance of Counsel.

Post-conviction court properly denied defendant's petition for relief because he failed to show that his trial counsel was ineffective where counsel visited with defendant between 17 and 19 times in the jail, and wrote at least six letters to him discussing the contents of discovery and answering defendant's questions, counsel also provided defendant with adequate information regarding trial strategy and the potential consequences of going to trial, provided defendant with discovery on two occasions, which they reviewed on multiple occasions, and reviewed all of the evidence in defendant's case so that defendant could make an "informed decision" to accept the plea offer from the State. *Balfour v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 513 (Tenn. Crim. App. July 27, 2020).

Petitioner was unable to prove trial counsel was ineffective and was not entitled to relief because petitioner failed to offer any evidence that preponderated against the post-conviction

court's finding that trial counsel performed within the range of competence expected of attorneys in the community and under the constitution of the United States and the State of Tennessee; the post-conviction court found that trial counsel's decision to pursue a plea deal was reasonable because petitioner would, in fact, have faced a substantially higher sentence if convicted as a Range II offender. *Woodruff v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 48 (Tenn. Crim. App. Feb. 10, 2021).

Petition for post-conviction relief was properly denied because counsel did not render deficient performance for failing to object to the use of physical restraints, but, regardless, petitioner had not proven that any deficiency caused him prejudice; counsel argued for extremely minimal restraints and took efforts to

conceal the restraints from the jury, and counsel discussed the issue with petitioner and recalled that he never voiced a disagreement to her about the use of ankle restraints. *Way v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 53 (Tenn. Crim. App. Feb. 11, 2021).

Petition for post-conviction relief was properly denied because counsel did not render deficient performance for failing to call exculpatory witnesses; counsel made strategic decisions with regard to the potential witnesses to which petitioner made her aware and called as a witness at trial the only person who claimed to know where petitioner was during the time of the burglary, and the other witnesses identified by petitioner could not have corroborated his alibi. *Way v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 53 (Tenn. Crim. App. Feb. 11, 2021).

40-30-111. Final disposition of petitions — Compliance reports.

NOTES TO DECISIONS

3. Findings of Fact.

In an action for post-conviction relief, the record was devoid of any findings of fact and conclusions of law with regards to petitioner's issues, including those touching on the Board of Professional Responsibility's inquiry into the prosecutor and lead counsel's role in the inquiry into petitioner's insanity; the lack of an objection to testimony that petitioner was not committable; and the trial court's alleged conflict of interest and whether petitioner was adequately advised of those circumstances. *Johnson v. State*, — S.W.3d —, 2020 Tenn.

Crim. App. LEXIS 602 (Tenn. Crim. App. Sept. 8, 2020).

Because the post-conviction court failed to make any findings of fact and conclusions of law with respect to the issues raised in defendant's petition for post-conviction relief, the appellate court remanded the case to the post-conviction court for the entry of an order setting forth the required findings of fact and conclusions of law as to each of defendant's allegations. *Cooper v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 678 (Tenn. Crim. App. Oct. 16, 2020).

DECISIONS UNDER PRIOR LAW

ANALYSIS

3. Final Order.
4. —Noncompliance with Requisites.
3. Final Order.

4. —Noncompliance with Requisites.

Although the trial court in denying defendant post-conviction relief erred by failing to

enter a final order or written memorandum conforming to the statutory requirements, the error was harmless in light of the court's oral pronouncements. Furthermore, the record included a minute entry, stating that the post-conviction court denied the post-conviction petition. *Smith v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 779 (Tenn. Crim. App. Dec. 4, 2020).

40-30-117. Motions to reopen.

NOTES TO DECISIONS

ANALYSIS

6. Procedure.
13. Criteria Not Met.

6. Procedure.

Post-conviction court lacked jurisdiction to accept the agreed order entered between the inmate and the district attorney general and to

amend the inmate's final judgment of conviction because it did not comply with the statutory requirements for granting relief under the Post-Conviction Procedure Act. *Abdur'Rahman v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 764 (Tenn. Crim. App. Nov. 30, 2020).

13. Criteria Not Met.

Because defendant failed to introduce any new scientific evidence that would have sup-

ported defendant's claim of actual innocence, the denial of relief by the post-conviction court was appropriate. *French v. State*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 103 (Tenn. Crim. App. Mar. 23, 2021).

PART 3 POST-CONVICTION DNA ANALYSIS ACT OF 2001

40-30-303. Petition requesting analysis.

NOTES TO DECISIONS

1. Analysis not Warranted.

Trial court did not err by summarily denying the petition for DNA testing of a condom because the petition failed to allege a prima facie case entitling petitioner to relief, as it failed to allege that the evidence was in existence and susceptible to DNA testing or that there was a reasonable probability petitioner would not have been prosecuted or convicted or would have received a more favorable sentence or verdict with the requested DNA results. Noth-

ing in the record, including the pleadings, reflected whether any DNA was ever collected from the deceased victim or whether there was female DNA on the condom. *State v. Downs*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 729 (Tenn. Crim. App. Nov. 17, 2020).

Petition for post-conviction DNA analysis must allege a prima facie case for relief or be subject to summary dismissal. *State v. Downs*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 729 (Tenn. Crim. App. Nov. 17, 2020).

40-30-304. Court order if probable that exculpatory results would not have resulted in prosecution or conviction.

NOTES TO DECISIONS

ANALYSIS

1. Analysis not Warranted.
3. Petition Properly Denied.

1. Analysis not Warranted.

Petition for post-conviction DNA analysis must allege a prima facie case for relief or be subject to summary dismissal. *State v. Downs*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 729 (Tenn. Crim. App. Nov. 17, 2020).

3. Petition Properly Denied.

Trial court did not err by summarily denying the petition for DNA testing of a condom be-

cause the petition failed to allege a prima facie case entitling petitioner to relief, as it failed to allege that the evidence was in existence and susceptible to DNA testing or that there was a reasonable probability petitioner would not have been prosecuted or convicted or would have received a more favorable sentence or verdict with the requested DNA results. Nothing in the record, including the pleadings, reflected whether any DNA was ever collected from the deceased victim or whether there was female DNA on the condom. *State v. Downs*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 729 (Tenn. Crim. App. Nov. 17, 2020).

40-30-305. Court order if probable that results would have resulted in a more favorable verdict or sentence.

NOTES TO DECISIONS

3. Analysis Not Warranted.

Petition for post-conviction DNA analysis must allege a prima facie case for relief or be subject to summary dismissal. *State v. Downs*,

— S.W.3d —, 2020 Tenn. Crim. App. LEXIS 729 (Tenn. Crim. App. Nov. 17, 2020).

Trial court did not err by summarily denying the petition for DNA testing of a condom be-

cause the petition failed to allege a prima facie case entitling petitioner to relief, as it failed to allege that the evidence was in existence and susceptible to DNA testing or that there was a reasonable probability petitioner would not have been prosecuted or convicted or would have received a more favorable sentence or

verdict with the requested DNA results. Nothing in the record, including the pleadings, reflected whether any DNA was ever collected from the deceased victim or whether there was female DNA on the condom. *State v. Downs*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 729 (Tenn. Crim. App. Nov. 17, 2020).

CHAPTER 32

DESTRUCTION OF RECORDS UPON DISMISSAL OR ACQUITTAL

40-32-101. Destruction or release of records.

NOTES TO DECISIONS

18. Jurisdiction.

Trial court had jurisdiction to consider and rule on the agreed petition for expunction and the trial court’s order of expunction became final on November 16, 2018, at which time the trial court lost jurisdiction of the case. Conse-

quently, the trial court lacked jurisdiction to hear the State’s motion to re-consider the order of expunction. *State v. Brown*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 671 (Tenn. Crim. App. Oct. 13, 2020).

CHAPTER 35

TENNESSEE CRIMINAL SENTENCING REFORM ACT OF 1989

PART 1 GENERAL PROVISIONS

40-35-101. Short title.

NOTES TO DECISIONS

9. Sentence Upheld.

Trial court did not abuse its discretion in denying defendant an alternative sentence and in ordering defendant to serve defendant’s sentence in incarceration because the trial court found that defendant had several prior felonies, no ties to the county, and had absconded before

even registering as a sex offender as required after defendant’s guilty plea. Furthermore, the record reflected that the trial court engaged in a careful consideration of the facts and the law. *State v. McLeod*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 720 (Tenn. Crim. App. Nov. 10, 2020).

40-35-102. Purpose of chapter.

NOTES TO DECISIONS

ANALYSIS

- 5. Review Considerations.
- 6. —Deterrence.
- 14. Denial of Alternative Sentencing Affirmed.
- 15. Sentence Upheld.
- 17. Denial of Probation Affirmed.
- 17.5. Denial of Full Probation Appropriate.

5. Review Considerations.

6. —Deterrence.

Trial court did not consider a sentence of full probation to be a form of punishment, and because the trial court failed to consider the factors articulated in case law and no evidence supported a finding of the need for deterrence, the trial court erred by ordering confinement.

State v. Walkington, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 734 (Tenn. Crim. App. Nov. 19, 2020).

14. Denial of Alternative Sentencing Affirmed.

In a case in which defendant was convicted of one count of aggravated statutory rape, although a favorable candidate for alternative sentencing, he was properly denied alternative sentencing based upon depreciating the seriousness of the offense, deterrence, and the circumstances surrounding the offense because, over a period of months, defendant engaged in sexual activity with the victim, who was developmentally delayed and vulnerable, on three occasions other than the offense for which he was convicted; and, although he was acquitted of the three other acts, the verdict of acquittal did not prevent the sentencing court from considering defendant's conduct underlying the acquitted charge as it was proven by a preponderance of the evidence. *State v. Powell*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 518 (Tenn. Crim. App. July 27, 2020).

Trial court did not err by ordering defendant to serve his effective sentence of eight years and six months in confinement because he was not considered a favorable candidate for alternative sentencing options as measures less restrictive than confinement had frequently or recently been applied unsuccessfully to defendant because he was on release from a federal sentence when he committed the offenses; and, although he had been released on parole in other cases, which he successfully completed, he continued to commit crimes. *State v. Porter*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 654 (Tenn. Crim. App. Oct. 6, 2020).

Defendant's request for alternative sentencing was properly denied and the trial court did not err in ordering that defendant serve his sentence in confinement because defendant had a history of committing similar theft offenses and had been previously granted probation, which he violated; previous rehabilitation, drug treatment, and grants of probation had not worked; although defendant gave an allocution indicating a desire to support his children and life changes he had made, he had committed similar theft offenses before and after committing the instant theft offense; and he was not entitled to probation, regardless of his remorse or plans for the future. *State v. Loper*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 688 (Tenn. Crim. App. Oct. 22, 2020).

Trial court did not abuse its discretion in denying defendant an alternative sentence and in ordering defendant to serve defendant's sentence in incarceration because the trial court found that defendant had several prior felonies, no ties to the county, and had absconded before even registering as a sex offender as required after defendant's guilty plea. Furthermore, the

record reflected that the trial court engaged in a careful consideration of the facts and the law. *State v. McLeod*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 720 (Tenn. Crim. App. Nov. 10, 2020).

Trial court did not abuse its discretion by denying defendant's request for community corrections for defendant's driving under the influence convictions (which were merged) because the court found that confinement was necessary to protect society and to avoid depreciating the seriousness of the offense and that less restrictive than confinement had been applied unsuccessfully to defendant. The court further found that defendant's potential for rehabilitation was not great. *State v. Shumacker*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 60 (Tenn. Crim. App. Feb. 24, 2021).

Trial court properly denied alternative sentencing to defendant because the court considered the evidence presented at the guilty plea hearing, the presentence report, and the evidence presented at the sentencing hearing, as well as the principles of sentencing and the available sentencing alternatives, defendant had many prior offenses and several violations of probation, measures less restrictive than confinement had frequently been applied to defendant without success, and the record reflected that the trial court properly engaged in a careful and detailed consideration of the facts and the law. *State v. Ingram*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 115 (Tenn. Crim. App. Mar. 29, 2021).

Evidence overcame the presumption of defendant's favorability for an alternative sentence as he was at a high risk for reoffending if placed on probation; and he would be a tremendous risk to himself or the public. *State v. Ledford*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 157 (Tenn. Crim. App. Apr. 19, 2021).

Trial court did not err denying defendant alternative sentencing because she had 18 prior convictions, including several probation violations, and the record showed that the trial court carefully considered the evidence, the enhancement and mitigating factors, and the purposes and principles of sentencing prior to imposing a sentence of confinement. *State v. Givens*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 159 (Tenn. Crim. App. Apr. 20, 2021).

15. Sentence Upheld.

Trial court did not abuse its discretion by denying defendant's request for alternative sentencing and by imposing within-range consecutive sentences when defendant was convicted of possession of heroin with the intent to sell and possession with intent to deliver 0.5 gram or more of cocaine because the court considered the presentence report, defendant's prior drug-related felonies and misdemeanors, defendant's physical and mental conditions, the nature of the offenses, defendant's likelihood of

rehabilitation, and the evidence presented. *State v. Johnson*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 545 (Tenn. Crim. App. Aug. 7, 2020).

Trial court properly sentenced defendant as a career offender to six years for violation of the Sex Offender Registry; the sentence was within the appropriate range, and the trial court thoroughly articulated its reasoning, including that defendant had failed to comply with probation numerous times and had another charge in another county while waiting for sentencing on the current charge. *State v. Davis*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 546 (Tenn. Crim. App. Aug. 7, 2020).

In a case in which defendant pleaded guilty to one count of aggravated sexual exploitation of a minor and one count of sexual exploitation of a minor involving over 50 images, the court of criminal appeals concluded that the trial court sentenced defendant to a sentence within the range for each conviction and followed the proper sentencing procedure. The record showed that the trial court carefully considered the evidence, the enhancement and mitigating factors, and the purposes and principles of sentencing prior to imposing a sentence of confinement. *State v. Hernandez*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 551 (Tenn. Crim. App. Aug. 12, 2020).

Trial court did not err in sentencing defendant to a seven-year sentence in confinement for possession of contraband in a penal institution as the sentence was in range for a Range II, multiple offender and the court properly applied an enhancement factor for defendant's numerous prior criminal convictions and behavior. The trial court did not abuse its discretion by denying defendant's request for alternative sentencing given defendant's continued drug use despite treatment, continuing to commit crimes, and frequent violations of probation. *State v. Marlow*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 693 (Tenn. Crim. App. Oct. 23, 2020).

Defendant's 24-year sentence for second degree murder was appropriate because he treated the victim with exceptional cruelty by stabbing the victim in the neck and an additional 20 times; he abused a position of private trust; he did not act under strong provocation as he disarmed the victim and the threat was terminated; and he did not murder the victim under such unusual circumstances that he did not have a sustained intent to violate the law as he stabbed the victim 21 times. *State v. Gadsden*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 739 (Tenn. Crim. App. Nov. 19, 2020).

Trial court did not abuse its discretion by sentencing defendant as a Range III, persistent offender to 12 years for defendant's driving under the influence convictions (which were merged) because defendant had a previous history of criminal convictions, previously failed to

comply with the terms of probation, and had no hesitation about committing a crime when the risk to human life was high. While defendant had a rough and tough childhood and mental illness, the court found that the potential for rehabilitation was not great. *State v. Shumacker*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 60 (Tenn. Crim. App. Feb. 24, 2021).

Trial court did not abuse its discretion in sentencing defendant for two counts of possession of methamphetamine with intent to sell, driving on revoked license, and possession of a controlled substance and drug paraphernalia; the sentences were within range, the trial court was free to give one mitigating factor zero weight, and although the trial court did not reference T.C.A. § 40-35-102(5) explicitly, the sentence imposed was consistent with sentencing principles. Defendant had prior convictions and previously violated probation conditions. *State v. Declue*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 70 (Tenn. Crim. App. Mar. 4, 2021).

Trial court did not abuse its discretion by enhancing defendant's sentences within the range of punishment upon defendant's convictions for two counts each of aggravated burglary, employing a firearm during the commission of a dangerous felony, and aggravated robbery because the sentences imposed were within the applicable range of punishment for each conviction. Furthermore, the evidence supported the court's application of enhancement factors for defendant's prior convictions and being a leader in the commission of the crimes. *State v. Anderson*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 76 (Tenn. Crim. App. Mar. 5, 2021).

17. Denial of Probation Affirmed.

Although defendant was eligible for probation as the actual sentence imposed for each of his convictions of attempted aggravated sexual exploitation of a minor and attempted sexual exploitation of a minor was 10 years or less, and the offenses for which defendant was sentenced were not specifically excluded by statute, defendant did not qualify for favorable status consideration because he pled guilty as a Range II multiple offender on count 2 of attempted sexual exploitation of a minor; he had a lengthy history of viewing child pornography; and he was at an elevated risk for reoffending and a poor prospect for probation. *State v. Durick*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 669 (Tenn. Crim. App. Oct. 13, 2020).

Trial court did not err in ordering that defendant's entire sentence for aggravated assault be served in confinement and in denying full probation because the trial court needed to avoid depreciating the seriousness of the offense; the sentence of incarceration for the entire sentence and the denial of probation was compliant with the purposes and principles of

sentencing; defendant violated probation twice in 2018, within a span of four months, and also committed a new offense which resulted in a conviction; and defendant lacked the potential for rehabilitation. *State v. Kirby*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 759 (Tenn. Crim. App. Nov. 30, 2020).

Trial court abused its discretion by ordering defendant to serve his entire sentence for violating the sex offender registry in incarceration because, although defendant was eligible for alternative sentencing, he was not a favorable candidate for alternative sentencing given his many prior offenses and several probation violations. *State v. Theus*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 11 (Tenn. Crim. App. Jan. 8, 2021).

40-35-103. Sentencing considerations.

NOTES TO DECISIONS

ANALYSIS

3. Seriousness of Offense.
4. Deterrence.
5. Measures Less Restrictive Than Confinement Unsuccessful.
11. Sentence Upheld on Appeal.
13. Denial of Probation Affirmed.
15. Denial of Alternative Sentencing Affirmed.
- 15.5. Denial of Alternative Sentencing Imperper.
16. Sentence Upheld.

3. Seriousness of Offense.

Trial court did not err in ordering that defendant's entire sentence for aggravated assault be served in confinement and in denying full probation because the trial court needed to avoid depreciating the seriousness of the offense; the sentence of incarceration for the entire sentence and the denial of probation was compliant with the purposes and principles of sentencing; defendant violated probation twice in 2018, within a span of four months, and also committed a new offense which resulted in a conviction; and defendant lacked the potential for rehabilitation. *State v. Kirby*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 759 (Tenn. Crim. App. Nov. 30, 2020).

4. Deterrence.

Trial court did not consider a sentence of full probation to be a form of punishment, and because the trial court failed to consider the factors articulated in case law and no evidence supported a finding of the need for deterrence, the trial court erred by ordering confinement. *State v. Walkington*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 734 (Tenn. Crim. App. Nov. 19, 2020).

17.5 Denial of Full Probation Appropriate.

Trial court did not abuse its discretion by finding that defendant was not an appropriate candidate for full probation after service of the statutory minimum jail sentence, and his sentence of 11 months, 29 days to be served as 120 days in jail followed by supervised probation was upheld for his driving while intoxicated, second offense, conviction; defendant had a prior criminal history that included several felonies and numerous misdemeanors and he had violated several probation sentences in the past. *State v. Groseclose*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 675 (Tenn. Crim. App. Oct. 15, 2020).

5. Measures Less Restrictive Than Confinement Unsuccessful.

Trial court did not err in imposing an 18-year, fully-incarcerative sentence for defendant's possession with intent to sell or deliver heroin conviction, given his criminal history and failure to comply with sentences involving release; measures less restrictive than confinement had been applied unsuccessfully. *State v. Davis*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 641 (Tenn. Crim. App. Sept. 28, 2020).

11. Sentence Upheld on Appeal.

Trial court did not abuse its discretion by finding that defendant was not an appropriate candidate for full probation after service of the statutory minimum jail sentence, and his sentence of 11 months, 29 days to be served as 120 days in jail followed by supervised probation was upheld for his driving while intoxicated, second offense, conviction; defendant had a prior criminal history that included several felonies and numerous misdemeanors and he had violated several probation sentences in the past. *State v. Groseclose*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 675 (Tenn. Crim. App. Oct. 15, 2020).

Defendant's 12-year sentence was appropriate as she was subject to a sentencing range of 8-12 years for aggravated robbery; she had a prior history of criminal convictions consisting of sale or possession of felony drugs, misdemeanor stalking and domestic assault, and a driving related offense; no mitigation factors applied; and defendant did not show any remorse or acceptance of responsibility. *State v. Gore*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 736 (Tenn. Crim. App. Nov. 18, 2020).

Trial court properly exercised its discretion in ordering defendant to serve a within-range sentence of thirty years for second degree mur-

der because it found that multiple enhancement factors applied; the trial court determined that defendant had a history of criminal convictions or behavior in addition to those necessary to establish the appropriate range, that he had committed murder while on probation for another offense, that he had no hesitation about committing a crime when the risk to human life was high, and that he employed or possessed a firearm during the commission of the murder. *State v. Deberry*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 49 (Tenn. Crim. App. Feb. 10, 2021).

13. Denial of Probation Affirmed.

Although defendant was eligible for probation as the actual sentence imposed for each of his convictions of attempted aggravated sexual exploitation of a minor and attempted sexual exploitation of a minor was 10 years or less, and the offenses for which defendant was sentenced were not specifically excluded by statute, defendant did not qualify for favorable status consideration because he pled guilty as a Range II multiple offender on count 2 of attempted sexual exploitation of a minor; he had a lengthy history of viewing child pornography; and he was at an elevated risk for reoffending and a poor prospect for probation. *State v. Durick*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 669 (Tenn. Crim. App. Oct. 13, 2020).

Trial court properly denied defendant's request for probation because the court considered the statutory criteria, as well as other facts and circumstances supported by the record, and noted that defendant had 10 or 11 prior felonies, 22 prior misdemeanors, and was on probation at the time he committed the offenses against the victim. *State v. Wheeler*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 153 (Tenn. Crim. App. Apr. 15, 2021).

15. Denial of Alternative Sentencing Affirmed.

In a case in which defendant was convicted of one count of aggravated statutory rape, although a favorable candidate for alternative sentencing, he was properly denied alternative sentencing based upon depreciating the seriousness of the offense, deterrence, and the circumstances surrounding the offense because, over a period of months, defendant engaged in sexual activity with the victim, who was developmentally delayed and vulnerable, on three occasions other than the offense for which he was convicted; and, although he was acquitted of the three other acts, the verdict of acquittal did not prevent the sentencing court from considering defendant's conduct underlying the acquitted charge as it was proven by a preponderance of the evidence. *State v. Powell*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 518 (Tenn. Crim. App. July 27, 2020).

Trial court did not err by ordering defendant to serve his effective sentence of eight years and six months in confinement because he was not considered a favorable candidate for alternative sentencing options as measures less restrictive than confinement had frequently or recently been applied unsuccessfully to defendant because he was on release from a federal sentence when he committed the offenses; and, although he had been released on parole in other cases, which he successfully completed, he continued to commit crimes. *State v. Porter*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 654 (Tenn. Crim. App. Oct. 6, 2020).

Defendant's request for alternative sentencing was properly denied and the trial court did not err in ordering that defendant serve his sentence in confinement because defendant had a history of committing similar theft offenses and had been previously granted probation, which he violated; previous rehabilitation, drug treatment, and grants of probation had not worked; although defendant gave an allocution indicating a desire to support his children and life changes he had made, he had committed similar theft offenses before and after committing the instant theft offense; and he was not entitled to probation, regardless of his remorse or plans for the future. *State v. Loper*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 688 (Tenn. Crim. App. Oct. 22, 2020).

Trial court did not abuse its discretion in denying defendant an alternative sentence and in ordering defendant to serve defendant's sentence in incarceration because the trial court found that defendant had several prior felonies, no ties to the county, and had absconded before even registering as a sex offender as required after defendant's guilty plea. Furthermore, the record reflected that the trial court engaged in a careful consideration of the facts and the law. *State v. McLeod*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 720 (Tenn. Crim. App. Nov. 10, 2020).

Defendant did not establish that the trial court abused its discretion by denying defendant an alternative sentence because the evidence established that defendant committed a drug offense while released on bond and tested positive for marijuana and prescription pills during a drug screening at defendant's presentence report meeting, also while on bond. Defendant's conduct of committing offenses while on bond showed a poor amenability to rehabilitations. *State v. Norris*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 800 (Tenn. Crim. App. Dec. 17, 2020).

Trial court did not err by sentencing defendant to a community corrections placement because the record showed that he had a long history of criminal conduct and that measures less restrictive than confinement had frequently and recently been applied to him, as he outfitted himself with an elaborate apparatus

in an attempt to defeat the drug screen for his presentence report in one case, at a time when he was on probation in another case and on a furlough in a third case granted for the purpose of his obtaining drug and alcohol treatment. *State v. Wallace*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 16 (Tenn. Crim. App. Jan. 12, 2021).

Trial court did not abuse its discretion by denying defendant's request for community corrections for defendant's driving under the influence convictions (which were merged) because the court found that confinement was necessary to protect society and to avoid depreciating the seriousness of the offense and that less restrictive than confinement had been applied unsuccessfully to defendant. The court further found that defendant's potential for rehabilitation was not great. *State v. Shumacker*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 60 (Tenn. Crim. App. Feb. 24, 2021).

Trial court did not abuse its discretion in denying an alternative sentence because it considered and placed great weight on defendant's criminal record, especially his 2011 convictions for aggravated robbery and attempted aggravated robbery, which the court characterized as crimes of violence; it expressed its concern that defendant was now being sentenced for robbery, the same type of offense for which defendant had been previously convicted and incarcerated in the Tennessee Department of Correction; and it expressed frustration that defendant kept needing repeated chances to change supporting the need for incarceration to deter defendant from future criminal activity and to protect the public. *State v. Clabough*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 95 (Tenn. Crim. App. Mar. 16, 2021).

Trial court properly denied alternative sentencing to defendant because the court considered the evidence presented at the guilty plea hearing, the presentence report, and the evidence presented at the sentencing hearing, as well as the principles of sentencing and the available sentencing alternatives, defendant had many prior offenses and several violations of probation, measures less restrictive than confinement had frequently been applied to defendant without success, and the record reflected that the trial court properly engaged in a careful and detailed consideration of the facts and the law. *State v. Ingram*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 115 (Tenn. Crim. App. Mar. 29, 2021).

Trial court made the required findings on the record and considered all relevant factors in the statute in determining that the nature of the offense outweighed the factors in favor of alternative sentencing; defendant inflicted various injuries on her husband, who had multiple sclerosis and was vulnerable, including burning him with a curling iron, punching him, and biting his face, which the trial court described

as extremely egregious and an act of sadistic torturing. *State v. McCroskey*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 142 (Tenn. Crim. App. Apr. 12, 2021).

Evidence overcame the presumption of defendant's favorability for an alternative sentence as he was at a high risk for reoffending if placed on probation; and he would be a tremendous risk to himself or the public. *State v. Ledford*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 157 (Tenn. Crim. App. Apr. 19, 2021).

Trial court did not err denying defendant alternative sentencing because she had 18 prior convictions, including several probation violations, and the record showed that the trial court carefully considered the evidence, the enhancement and mitigating factors, and the purposes and principles of sentencing prior to imposing a sentence of confinement. *State v. Givens*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 159 (Tenn. Crim. App. Apr. 20, 2021).

15.5 Denial of Alternative Sentencing Improper.

Trial court erred in applying the effective deterrence prong to deny an alternative sentence for which defendant was eligible. *State v. Armstrong*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 672 (Tenn. Crim. App. Oct. 13, 2020).

16. Sentence Upheld.

Trial court did not abuse its discretion by denying defendant's request for alternative sentencing and by imposing within-range consecutive sentences when defendant was convicted of possession of heroin with the intent to sell and possession with intent to deliver 0.5 gram or more of cocaine because the court considered the presentence report, defendant's prior drug-related felonies and misdemeanors, defendant's physical and mental conditions, the nature of the offenses, defendant's likelihood of rehabilitation, and the evidence presented. *State v. Johnson*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 545 (Tenn. Crim. App. Aug. 7, 2020).

Trial court properly sentenced defendant as a career offender to six years for violation of the Sex Offender Registry; the sentence was within the appropriate range, and the trial court thoroughly articulated its reasoning, including that defendant had failed to comply with probation numerous times and had another charge in another county while waiting for sentencing on the current charge. *State v. Davis*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 546 (Tenn. Crim. App. Aug. 7, 2020).

In a case in which defendant pleaded guilty to one count of aggravated sexual exploitation of a minor and one count of sexual exploitation of a minor involving over 50 images, the court of criminal appeals concluded that the trial court sentenced defendant to a sentence within the

range for each conviction and followed the proper sentencing procedure. The record showed that the trial court carefully considered the evidence, the enhancement and mitigating factors, and the purposes and principles of sentencing prior to imposing a sentence of confinement. *State v. Hernandez*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 551 (Tenn. Crim. App. Aug. 12, 2020).

Trial court did not err in sentencing defendant to a seven-year sentence in confinement for possession of contraband in a penal institution as the sentence was in range for a Range II, multiple offender and the court properly applied an enhancement factor for defendant's numerous prior criminal convictions and behavior. The trial court did not abuse its discretion by denying defendant's request for alternative sentencing given defendant's continued drug use despite treatment, continuing to commit crimes, and frequent violations of probation. *State v. Marlow*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 693 (Tenn. Crim. App. Oct. 23, 2020).

Defendant's 24-year sentence for second degree murder was appropriate because he treated the victim with exceptional cruelty by stabbing the victim in the neck and an additional 20 times; he abused a position of private trust; he did not act under strong provocation as he disarmed the victim and the threat was terminated; and he did not murder the victim under such unusual circumstances that he did not have a sustained intent to violate the law as he stabbed the victim 21 times. *State v. Gadsden*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 739 (Tenn. Crim. App. Nov. 19, 2020).

Trial court did not abuse its discretion by sentencing defendant as a Range III, persistent offender to 12 years for defendant's driving under the influence convictions (which were merged) because defendant had a previous history of criminal convictions, previously failed to comply with the terms of probation, and had no hesitation about committing a crime when the risk to human life was high. While defendant had a rough and tough childhood and mental illness, the court found that the potential for rehabilitation was not great. *State v. Shumacker*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 60 (Tenn. Crim. App. Feb. 24, 2021).

Trial court did not abuse its discretion by enhancing defendant's sentences within the range of punishment upon defendant's convictions for two counts each of aggravated burglary, employing a firearm during the commission of a dangerous felony, and aggravated robbery because the sentences imposed were within the applicable range of punishment for each conviction. Furthermore, the evidence supported the court's application of enhancement factors for defendant's prior convictions and being a leader in the commission of the crimes. *State v. Anderson*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 76 (Tenn. Crim. App. Mar. 5, 2021).

Trial court did not err in sentencing the first defendant to the maximum sentences for aggravated arson, especially aggravated kidnapping, attempted second degree murder, aggravated robbery, and theft and ordering partial consecutive sentences because she was not a mitigate offender; society had to be protected from her and incarceration was necessary; defendant had a leadership role in the events, aimed her gun at the victim and attempted to fire it, and ordered another defendant to use the gun to kill the victim after her failed attempt; and she was not eligible for probation as aggravated robbery and especially aggravated kidnapping were specifically excluded as probatable. *State v. Robinson*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 96 (Tenn. Crim. App. Mar. 17, 2021).

Trial court did not err in sentencing defendant to 40 years for the facilitation of first-degree, felony murder conviction and 20 years for the attempted especially aggravated robbery conviction because the trial court properly considered defendant's criminal history and the statutory criteria in finding defendant to be a Range II, multiple offender; the trial court reviewed the presentence report, the nature and characteristics of the criminal conduct involved, the applicable enhancement and mitigating factors, and defendant's potential for rehabilitation; and the presentence report listed defendant's criminal history which began in 1995 at the age of 16 and included numerous misdemeanor and felony convictions. *State v. Bowen*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 149 (Tenn. Crim. App. Apr. 13, 2021).

40-35-106. Multiple offender.

NOTES TO DECISIONS

ANALYSIS

6. Alternative Sentencing Denied.
7. Prior Felony Convictions.

6. Alternative Sentencing Denied.

Defendant's request for alternative sentencing was properly denied and the trial court did not err in ordering that defendant serve his

sentence in confinement because defendant had a history of committing similar theft offenses and had been previously granted probation, which he violated; previous rehabilitation, drug treatment, and grants of probation had not worked; although defendant gave an allocution indicating a desire to support his children and life changes he had made, he had committed similar theft offenses before and after committing the instant theft offense; and he was not entitled to probation, regardless of his remorse or plans for the future. *State v. Loper*, — S.W.3d

—, 2020 Tenn. Crim. App. LEXIS 688 (Tenn. Crim. App. Oct. 22, 2020).

7. Prior Felony Convictions.

Trial court properly classified and sentenced defendant as a Range II offender based on defendant's prior felony conviction for robbery in Florida because robbery was a named felony in Tennessee. *State v. Mansir*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 635 (Tenn. Crim. App. Sept. 25, 2020).

40-35-108. Career offender.

NOTES TO DECISIONS

6. Sentence Proper.

Trial court properly sentenced defendant as a career offender to six years for violation of the Sex Offender Registry; the sentence was within the appropriate range, and the trial court thoroughly articulated its reasoning, including that

defendant had failed to comply with probation numerous times and had another charge in another county while waiting for sentencing on the current charge. *State v. Davis*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 546 (Tenn. Crim. App. Aug. 7, 2020).

40-35-110. Classification of offenses.

NOTES TO DECISIONS

7. Ineffective Assistance of Counsel.

Petition for post-conviction relief was properly denied as trial counsel was not ineffective because defendant failed to present the testimony of a medical expert or the medical records that he claimed would have benefited his defense; he failed to show what additional evidence counsel could have discovered with further investigation; he failed to establish his claim that counsel did not properly investigate

or call a witness as he did not present the witness or evidence to the post-conviction court; the post-conviction court accredited trial counsel's testimony that he was prepared for trial and that the decision to not call certain witnesses was strategic; and counsel made no guarantees to defendant as to the outcome of his case. *Hernandez v. State*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 760 (Tenn. Crim. App. Nov. 30, 2020).

40-35-111. Authorized terms of imprisonment and fines for felonies and misdemeanors.

NOTES TO DECISIONS

1. Proper Sentence.

Trial court appropriately sentenced defendant to six years of probation for perjury because it was within the statutorily authorized range permitted for Class E felonies, which was between one and six years. *State v. Sullivan*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 22 (Tenn. Crim. App. Jan. 14, 2021).

Trial court did not abuse its discretion in imposing a \$500.00 fine for theft of property; the trial court conducted a full, independent assessment of the fines fixed by the jury, specifically considering defendant's ability to pay these fines, and found that he had been em-

ployed in the past and was searching for work while living with his mother. *State v. Foster*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 114 (Tenn. Crim. App. Mar. 26, 2021).

As to defendant's fine for possession of drug paraphernalia, the Tennessee General Assembly had determined that a mandatory minimum fine of \$150.00 was required for that particular offense; accordingly, the trial court did not abuse its discretion in imposing the \$150.00 fine fixed by the jury. *State v. Foster*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 114 (Tenn. Crim. App. Mar. 26, 2021).

40-35-112. Sentence ranges.**NOTES TO DECISIONS****ANALYSIS**

3. Sentence Proper.
4. —Enhancement.
5. Sentence Improper.

3. Sentence Proper.

Trial court did not abuse its discretion by denying defendant's request for alternative sentencing and by imposing within-range consecutive sentences when defendant was convicted of possession of heroin with the intent to sell and possession with intent to deliver 0.5 gram or more of cocaine because the court considered the presentence report, defendant's prior drug-related felonies and misdemeanors, defendant's physical and mental conditions, the nature of the offenses, defendant's likelihood of rehabilitation, and the evidence presented. *State v. Johnson*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 545 (Tenn. Crim. App. Aug. 7, 2020).

Trial court properly sentenced defendant as a career offender to six years for violation of the Sex Offender Registry; the sentence was within the appropriate range, and the trial court thoroughly articulated its reasoning, including that defendant had failed to comply with probation numerous times and had another charge in another county while waiting for sentencing on the current charge. *State v. Davis*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 546 (Tenn. Crim. App. Aug. 7, 2020).

Trial court properly sentenced defendant to a within range sentence of eight years and six months for aggravated assault and 11 months, 29 days for both reckless endangerment and domestic assault because, as a Range II offender multiple offender, defendant was subject to a sentencing range of six to 10 years for aggravated assault, and 11 months, 29 days for the Class A misdemeanors of reckless endangerment and domestic assault; defendant had a history of criminal convictions in addition to those necessary to establish the range; and he was on release from a federal sentence when he committed the offenses. *State v. Porter*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 654 (Tenn. Crim. App. Oct. 6, 2020).

Defendant's 12-year sentence was appropriate as she was subject to a sentencing range of 8-12 years for aggravated robbery; she had a prior history of criminal convictions consisting of sale or possession of felony drugs, misdemeanor stalking and domestic assault, and a driving related offense; no mitigation factors applied; and defendant did not show any remorse or acceptance of responsibility. *State v.*

Gore, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 736 (Tenn. Crim. App. Nov. 18, 2020).

Defendant's 24-year sentence for second degree murder was appropriate because he treated the victim with exceptional cruelty by stabbing the victim in the neck and an additional 20 times; he abused a position of private trust; he did not act under strong provocation as he disarmed the victim and the threat was terminated; and he did not murder the victim under such unusual circumstances that he did not have a sustained intent to violate the law as he stabbed the victim 21 times. *State v. Gadsden*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 739 (Tenn. Crim. App. Nov. 19, 2020).

Trial court did not abuse its discretion in sentencing defendant for two counts of possession of methamphetamine with intent to sell, driving on revoked license, and possession of a controlled substance and drug paraphernalia; the sentences were within range, the trial court was free to give one mitigating factor zero weight, and although the trial court did not reference T.C.A. § 40-35-102(5) explicitly, the sentence imposed was consistent with sentencing principles. Defendant had prior convictions and previously violated probation conditions. *State v. Declue*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 70 (Tenn. Crim. App. Mar. 4, 2021).

Trial court did not err in sentencing the first defendant to the maximum sentences for aggravated arson, especially aggravated kidnapping, attempted second degree murder, aggravated robbery, and theft and ordering partial consecutive sentences because she was not a mitigate offender; society had to be protected from her and incarceration was necessary; defendant had a leadership role in the events, aimed her gun at the victim and attempted to fire it, and ordered another defendant to use the gun to kill the victim after her failed attempt; and she was not eligible for probation as aggravated robbery and especially aggravated kidnapping were specifically excluded as probatable. *State v. Robinson*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 96 (Tenn. Crim. App. Mar. 17, 2021).

Trial court did not err in sentencing defendant to 40 years for the facilitation of first-degree, felony murder conviction and 20 years for the attempted especially aggravated robbery conviction because the trial court properly considered defendant's criminal history and the statutory criteria in finding defendant to be a Range II, multiple offender; the trial court reviewed the presentence report, the nature and characteristics of the criminal conduct involved, the applicable enhancement and mitigating factors, and defendant's potential for

rehabilitation; and the presentence report listed defendant's criminal history which began in 1995 at the age of 16 and included numerous misdemeanor and felony convictions. *State v. Bowen*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 149 (Tenn. Crim. App. Apr. 13, 2021).

4. —Enhancement.

Trial court did not err in sentencing defendant to a seven-year sentence in confinement for possession of contraband in a penal institution as the sentence was in range for a Range II, multiple offender and the court properly applied an enhancement factor for defendant's numerous prior criminal convictions and behavior. The trial court did not abuse its discretion by denying defendant's request for alternative sentencing given defendant's continued drug use despite treatment, continuing to commit crimes, and frequent violations of probation. *State v. Marlow*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 693 (Tenn. Crim. App. Oct. 23, 2020).

Trial court properly exercised its discretion in ordering defendant to serve a within-range sentence of thirty years for second degree murder because it found that multiple enhancement factors applied; the trial court determined that defendant had a history of criminal convictions or behavior in addition to those necessary to establish the appropriate range, that he had committed murder while on probation for another offense, that he had no hesitation about committing a crime when the risk to human life was high, and that he employed or possessed a firearm during the commission of the murder. *State v. Deberry*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 49 (Tenn. Crim. App. Feb. 10, 2021).

In a case in which defendant was convicted of 11 counts of aggravated assault, the record

supported the trial court's application of enhancement factors three and ten as there were multiple victims present at the scene other than those named in the charging instruments because the presentence report showed that a deputy was present while defendant fired shots and that unnamed S.W.A.T. officers responded to the ongoing incident. *State v. Ledford*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 157 (Tenn. Crim. App. Apr. 19, 2021).

5. Sentence Improper.

Because defendant was a Range I offender, and the rape of a child offense occurred before January 1, 2012, under a former version of this statute, the minimum statutory sentence of 25 years for defendant was also the maximum possible sentence, and the trial court erred in imposing a Range II sentence of 28 years. *State v. Fields*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 578 (Tenn. Crim. App. Aug. 25, 2020).

Trial court instructed the jury as to the elements of child neglect, a Class E felony, and that was the charge for which the jury rendered a guilty verdict; defendant's three-year sentence as a Range I offender for the Class D felony offense of child abuse was outside of the permissible range. *State v. Walkington*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 734 (Tenn. Crim. App. Nov. 19, 2020).

Trial court erred in sentencing defendant for defendant's unlawful possession of a firearm by a convicted felon counts because the court incorrectly classified the conviction of the count for conviction of a felony crime involving violence or its attempted use as a Class C felony and the conviction of the other count for conviction of a felony drug offense as a Class D felony. As a result, the case had to be remanded to the trial court for a new sentencing hearing. *State v. Bowen*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 19 (Tenn. Crim. App. Jan. 12, 2021).

40-35-113. Mitigating factors.

NOTES TO DECISIONS

ANALYSIS

6. Unusual Circumstances.
12. Sentence Upheld.

6. Unusual Circumstances.

Defendant's 24-year sentence for second degree murder was appropriate because he treated the victim with exceptional cruelty by stabbing the victim in the neck and an additional 20 times; he abused a position of private trust; he did not act under strong provocation as he disarmed the victim and the threat was terminated; and he did not murder the victim under such unusual circumstances that he did not have a sustained intent to violate the law as

he stabbed the victim 21 times. *State v. Gadsden*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 739 (Tenn. Crim. App. Nov. 19, 2020).

Trial court did not abuse its discretion in declining to apply mitigating weight to the fact that defendant, though guilty, committed the offense under such unusual circumstances that it was unlikely she had a sustained intent to violate the law, as defendant did not concede guilt. *State v. Smith*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 61 (Tenn. Crim. App. Feb. 25, 2021).

12. Sentence Upheld.

Trial court did not abuse its discretion by denying defendant's request for alternative sentencing and by imposing within-range con-

secutive sentences when defendant was convicted of possession of heroin with the intent to sell and possession with intent to deliver 0.5 gram or more of cocaine because the court considered the presentence report, defendant's prior drug-related felonies and misdemeanors, defendant's physical and mental conditions, the nature of the offenses, defendant's likelihood of rehabilitation, and the evidence presented. *State v. Johnson*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 545 (Tenn. Crim. App. Aug. 7, 2020).

Trial court did not err in sentencing defendant to a seven-year sentence in confinement for possession of contraband in a penal institution as the sentence was in range for a Range II, multiple offender and the court properly applied an enhancement factor for defendant's numerous prior criminal convictions and behavior. The trial court did not abuse its discretion by denying defendant's request for alternative sentencing given defendant's continued drug use despite treatment, continuing to commit crimes, and frequent violations of probation. *State v. Marlow*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 693 (Tenn. Crim. App. Oct. 23, 2020).

Trial court did not abuse its discretion by sentencing defendant as a Range III, persistent offender to 12 years for defendant's driving under the influence convictions (which were merged) because defendant had a previous history of criminal convictions, previously failed to comply with the terms of probation, and had no hesitation about committing a crime when the risk to human life was high. While defendant had a rough and tough childhood and mental illness, the court found that the potential for rehabilitation was not great. *State v. Shumacker*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 60 (Tenn. Crim. App. Feb. 24, 2021).

Defendant's 20-year, mid-range sentence for second-degree murder was appropriate because the trial court found that defendant had prior convictions for public intoxication and driving under the influence, although somewhat minor and remote, and employed a firearm during the commission of the offense. The court gave some mitigation based on defendant's good relationships with older siblings, cessation of drinking alcohol, and work history of manual labor type jobs until defendant was put on disability following a neck surgery. *State v. Olive*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 68 (Tenn. Crim. App. Mar. 3, 2021).

Trial court did not abuse its discretion in sentencing defendant for two counts of possession of methamphetamine with intent to sell, driving on revoked license, and possession of a controlled substance and drug paraphernalia; the sentences were within range, the trial court was free to give one mitigating factor zero weight, and although the trial court did not reference T.C.A. § 40-35-102(5) explicitly, the sentence imposed was consistent with sentencing principles. Defendant had prior convictions and previously violated probation conditions. *State v. Declue*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 70 (Tenn. Crim. App. Mar. 4, 2021).

Trial court did not abuse its discretion by enhancing defendant's sentences within the range of punishment upon defendant's convictions for two counts each of aggravated burglary, employing a firearm during the commission of a dangerous felony, and aggravated robbery because the sentences imposed were within the applicable range of punishment for each conviction. Furthermore, the evidence supported the court's application of enhancement factors for defendant's prior convictions and being a leader in the commission of the crimes. *State v. Anderson*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 76 (Tenn. Crim. App. Mar. 5, 2021).

40-35-114. Enhancement factors. [Effective until July 1, 2021. See the version effective on July 1, 2021.]

NOTES TO DECISIONS

ANALYSIS

- 2. Previous Criminal History.
- 6. Exceptional Cruelty.
- 8. Pleasure or Excitement.
- 9. Use of Firearm, Explosive, or Deadly Weapon.
- 10. Risk to Life.
- 15. Position of Trust.
- 20. Application of Factors.
- 21. Factor Improperly Considered.
- 23. Sentence Upheld.

2. Previous Criminal History.

Trial court properly sentenced defendant to a within range sentence of eight years and six months for aggravated assault and 11 months, 29 days for both reckless endangerment and domestic assault because, as a Range II offender multiple offender, defendant was subject to a sentencing range of six to 10 years for aggravated assault, and 11 months, 29 days for the Class A misdemeanors of reckless endangerment and domestic assault; defendant had a history of criminal convictions in addition to those necessary to establish the range; and he

was on release from a federal sentence when he committed the offenses. *State v. Porter*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 654 (Tenn. Crim. App. Oct. 6, 2020).

Trial court did not err by relying on defendant's conviction for aggravated assault as constituting prior criminal history for purposes of enhancement factor (1). *State v. Boyd*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 745 (Tenn. Crim. App. Nov. 19, 2020).

Trial court's imposition of the maximum sentences for his convictions was justified by the application of enhancement factor (1) alone because the presentence report reflected that in 2014, defendant pled guilty to the aggravated sexual battery of his ex-girlfriend's nine-year-old daughter; and he had prior convictions of unlawful drug paraphernalia uses and activities. *State v. Tomlin*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 145 (Tenn. Crim. App. Apr. 13, 2021).

6. Exceptional Cruelty.

Defendant's 24-year sentence for second degree murder was appropriate because he treated the victim with exceptional cruelty by stabbing the victim in the neck and an additional 20 times; he abused a position of private trust; he did not act under strong provocation as he disarmed the victim and the threat was terminated; and he did not murder the victim under such unusual circumstances that he did not have a sustained intent to violate the law as he stabbed the victim 21 times. *State v. Gadsden*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 739 (Tenn. Crim. App. Nov. 19, 2020).

8. Pleasure or Excitement.

Record supported the application of enhancement factor (7) to the rape of a child convictions because defendant promised the victim rewards and bought things for her when she complied with his sexual requests; and he bought her a provocative Halloween costume that was inappropriate for her age. *State v. Tomlin*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 145 (Tenn. Crim. App. Apr. 13, 2021).

9. Use of Firearm, Explosive, or Deadly Weapon.

Trial court did not err by sentencing defendant to 22 years incarceration for his conviction of second-degree murder because it was a within-range sentence and it properly determined that the use of a deadly weapon and exceptional cruelty enhancement factors outweighed any mitigating factors, as defendant fired numerous fatal shots at the victim, first in the back and then, after consideration, in the chest, from a close range. *State v. Walton*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 571 (Tenn. Crim. App. Aug. 20, 2020).

10. Risk to Life.

Trial court erred by applying an enhancement for having no hesitation about committing

a crime when the risk of human life was high because the risk to human life was inherent in the offense of voluntary manslaughter. However, the trial court placed little weight on that factor and thus, did not abuse its discretion by setting a sentence length of six years. *State v. Rivers*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 709 (Tenn. Crim. App. Nov. 3, 2020).

15. Position of Trust.

In a case in which defendant was convicted of aggravated sexual battery, solicitation of a minor, sexual battery by an authority figure, and 11 counts each of statutory rape by an authority figure, incest, and rape, defendant's effective sentence of 52 years' incarceration was not excessive because the trial court correctly applied the enhancement factors that defendant, the victim's stepfather, abused a position of private trust; and, although the court found that defendant's girlfriend was an emotionally troubled young lady who was taken advantage of by defendant, and that her testimony did not serve as mitigating evidence, the court did not consider her testimony against defendant as evidence supporting enhancement. *State v. Mason*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 582 (Tenn. Crim. App. Aug. 25, 2020).

Regarding defendant's sentences for rape and aggravated sexual battery, enhancement factor (14) applied because defendant occupied a position of private trust with the victims; although the trial court made no findings relative to defendant's being in a position of private trust with the victims, the record demonstrated that the victims were friends with defendant's children and that they regularly visited and had overnight stays with his children. *State v. Chaves-Abrego*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 5 (Tenn. Crim. App. Jan. 6, 2021).

20. Application of Factors.

Trial court properly exercised its discretion in ordering defendant to serve a within-range sentence of thirty years for second degree murder because it found that multiple enhancement factors applied; the trial court determined that defendant had a history of criminal convictions or behavior in addition to those necessary to establish the appropriate range, that he had committed murder while on probation for another offense, that he had no hesitation about committing a crime when the risk to human life was high, and that he employed or possessed a firearm during the commission of the murder. *State v. Deberry*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 49 (Tenn. Crim. App. Feb. 10, 2021).

21. Factor Improperly Considered.

Trial court misapplied enhancement factor (7), that the offense involved a victim and was committed to gratify the defendant's desire for

pleasure or excitement, to defendant's sentences for aggravated sexual battery, as the state supreme court has held that sexual battery necessarily includes the intent to gratify a desire for pleasure or excitement. *State v. Chaves-Abrego*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 5 (Tenn. Crim. App. Jan. 6, 2021).

23. Sentence Upheld.

Trial court did not err by not imposing the minimum sentences in the range, as the record amply supported the trial court's application of enhancement factor that defendant had a previous history of criminal convictions or behavior in addition to those necessary to establish the appropriate range. *State v. Rudd*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 539 (Tenn. Crim. App. July 31, 2020).

Trial court did not abuse its discretion by denying defendant's request for alternative sentencing and by imposing within-range consecutive sentences when defendant was convicted of possession of heroin with the intent to sell and possession with intent to deliver 0.5 gram or more of cocaine because the court considered the presentence report, defendant's prior drug-related felonies and misdemeanors, defendant's physical and mental conditions, the nature of the offenses, defendant's likelihood of rehabilitation, and the evidence presented. *State v. Johnson*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 545 (Tenn. Crim. App. Aug. 7, 2020).

In a case in which defendant was convicted of, *inter alia*, especially aggravated robbery, the trial court considered the relevant principles and sentenced defendant to a within-range sentence of eighteen years. As such, defendant was not entitled to relief. *State v. Banks*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 583 (Tenn. Crim. App. Aug. 25, 2020).

Trial court did not err in sentencing defendant to a seven-year sentence in confinement for possession of contraband in a penal institution as the sentence was in range for a Range II, multiple offender and the court properly applied an enhancement factor for defendant's numerous prior criminal convictions and behavior. The trial court did not abuse its discretion by denying defendant's request for alternative sentencing given defendant's continued drug use despite treatment, continuing to commit crimes, and frequent violations of probation. *State v. Marlow*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 693 (Tenn. Crim. App. Oct. 23, 2020).

Enhancement factors applied to defendant's sentences for rape and aggravated sexual battery, and the trial court imposed a sentence of 30 years, just five years above the minimum punishment for rape, and 10 years, just two years above the minimum punishment for aggravated sexual battery; despite one aggravating factor not applying to the aggravated sexual

battery conviction, given the other applicable factors, no abuse of discretion was found. *State v. Chaves-Abrego*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 5 (Tenn. Crim. App. Jan. 6, 2021).

Although defendant argued that the trial court erred in ordering defendant to serve a sentence for aggravated robbery consecutively to the automatic life sentence for a felony murder conviction because the underlying felony, aggravated robbery, was an essential element of the felony murder offense and could not be used as an enhancement factor for the felony murder sentence, the argument was without merit as the statute which addressed enhancement factors for singular offenses and the statute which addressed enhancement requirements for the alignment of sentences for multiple convictions were not in conflict. *State v. Fields*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 47 (Tenn. Crim. App. Feb. 10, 2021).

Trial court did not abuse its discretion by sentencing defendant as a Range III, persistent offender to 12 years for defendant's driving under the influence convictions (which were merged) because defendant had a previous history of criminal convictions, previously failed to comply with the terms of probation, and had no hesitation about committing a crime when the risk to human life was high. While defendant had a rough and tough childhood and mental illness, the court found that the potential for rehabilitation was not great. *State v. Shumacker*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 60 (Tenn. Crim. App. Feb. 24, 2021).

Defendant's 20-year, mid-range sentence for second-degree murder was appropriate because the trial court found that defendant had prior convictions for public intoxication and driving under the influence, although somewhat minor and remote, and employed a firearm during the commission of the offense. The court gave some mitigation based on defendant's good relationships with older siblings, cessation of drinking alcohol, and work history of manual labor type jobs until defendant was put on disability following a neck surgery. *State v. Olive*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 68 (Tenn. Crim. App. Mar. 3, 2021).

Trial court did not abuse its discretion by enhancing defendant's sentences within the range of punishment upon defendant's convictions for two counts each of aggravated burglary, employing a firearm during the commission of a dangerous felony, and aggravated robbery because the sentences imposed were within the applicable range of punishment for each conviction. Furthermore, the evidence supported the court's application of enhancement factors for defendant's prior convictions and being a leader in the commission of the crimes. *State v. Anderson*, — S.W.3d —, 2021

Tenn. Crim. App. LEXIS 76 (Tenn. Crim. App. Mar. 5, 2021).

Trial court did not err in sentencing the first defendant to the maximum sentences for aggravated arson, especially aggravated kidnapping, attempted second degree murder, aggravated robbery, and theft and ordering partial consecutive sentences because she was not a mitigate offender; society had to be protected from her and incarceration was necessary; defendant had a leadership role in the events, aimed her gun at the victim and attempted to fire it, and ordered another defendant to use the gun to kill the victim after her failed attempt; and she was not eligible for probation as aggravated robbery and especially aggravated kidnapping were specifically excluded as probatable. *State v. Robinson*, — S.W.3d —,

2021 Tenn. Crim. App. LEXIS 96 (Tenn. Crim. App. Mar. 17, 2021).

Third defendant's sentence was presumed reasonable because, although the trial court misapplied one enhancement factor, it properly found that he had a history of criminal convictions in addition to those necessary to establish his sentencing range; that he was a leader in the commission of the offense; that the personal injuries inflicted upon the victim or the amount of damage sustained by or taken from the victim was particularly great; that he possessed or employed a firearm during the commission of the offense; and that he was on a condition of release at the time of his arrest. *State v. Robinson*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 96 (Tenn. Crim. App. Mar. 17, 2021).

40-35-114. Enhancement factors. [Effective on July 1, 2021. See the version effective until July 1, 2021.]

NOTES TO DECISIONS

ANALYSIS

2. Previous Criminal History.
6. Exceptional Cruelty.
8. Pleasure or Excitement.
9. Use of Firearm, Explosive, or Deadly Weapon.
10. Risk to Life.
15. Position of Trust.
20. Application of Factors.
21. Factor Improperly Considered.
23. Sentence Upheld.

2. Previous Criminal History.

Trial court properly sentenced defendant to a within range sentence of eight years and six months for aggravated assault and 11 months, 29 days for both reckless endangerment and domestic assault because, as a Range II offender multiple offender, defendant was subject to a sentencing range of six to 10 years for aggravated assault, and 11 months, 29 days for the Class A misdemeanors of reckless endangerment and domestic assault; defendant had a history of criminal convictions in addition to those necessary to establish the range; and he was on release from a federal sentence when he committed the offenses. *State v. Porter*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 654 (Tenn. Crim. App. Oct. 6, 2020).

Trial court did not err by relying on defendant's conviction for aggravated assault as constituting prior criminal history for purposes of enhancement factor (1). *State v. Boyd*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 745 (Tenn. Crim. App. Nov. 19, 2020).

Trial court's imposition of the maximum sentences for his convictions was justified by the application of enhancement factor (1) alone because the presentence report reflected that in 2014, defendant pled guilty to the aggravated sexual battery of his ex-girlfriend's nine-year-old daughter; and he had prior convictions of unlawful drug paraphernalia uses and activities. *State v. Tomlin*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 145 (Tenn. Crim. App. Apr. 13, 2021).

6. Exceptional Cruelty.

Defendant's 24-year sentence for second degree murder was appropriate because he treated the victim with exceptional cruelty by stabbing the victim in the neck and an additional 20 times; he abused a position of private trust; he did not act under strong provocation as he disarmed the victim and the threat was terminated; and he did not murder the victim under such unusual circumstances that he did not have a sustained intent to violate the law as he stabbed the victim 21 times. *State v. Gadsden*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 739 (Tenn. Crim. App. Nov. 19, 2020).

8. Pleasure or Excitement.

Record supported the application of enhancement factor (7) to the rape of a child convictions because defendant promised the victim rewards and bought things for her when she complied with his sexual requests; and he bought her a provocative Halloween costume that was inappropriate for her age. *State v. Tomlin*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 145 (Tenn. Crim. App. Apr. 13, 2021).

9. Use of Firearm, Explosive, or Deadly Weapon.

Trial court did not err by sentencing defendant to 22 years incarceration for his conviction of second-degree murder because it was a within-range sentence and it properly determined that the use of a deadly weapon and exceptional cruelty enhancement factors outweighed any mitigating factors, as defendant fired numerous fatal shots at the victim, first in the back and then, after consideration, in the chest, from a close range. *State v. Walton*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 571 (Tenn. Crim. App. Aug. 20, 2020).

10. Risk to Life.

Trial court erred by applying an enhancement for having no hesitation about committing a crime when the risk of human life was high because the risk to human life was inherent in the offense of voluntary manslaughter. However, the trial court placed little weight on that factor and thus, did not abuse its discretion by setting a sentence length of six years. *State v. Rivers*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 709 (Tenn. Crim. App. Nov. 3, 2020).

15. Position of Trust.

In a case in which defendant was convicted of aggravated sexual battery, solicitation of a minor, sexual battery by an authority figure, and 11 counts each of statutory rape by an authority figure, incest, and rape, defendant's effective sentence of 52 years' incarceration was not excessive because the trial court correctly applied the enhancement factors that defendant, the victim's stepfather, abused a position of private trust; and, although the court found that defendant's girlfriend was an emotionally troubled young lady who was taken advantage of by defendant, and that her testimony did not serve as mitigating evidence, the court did not consider her testimony against defendant as evidence supporting enhancement. *State v. Mason*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 582 (Tenn. Crim. App. Aug. 25, 2020).

Regarding's defendant's sentences for rape and aggravated sexual battery, enhancement factor (14) applied because defendant occupied a position of private trust with the victims; although the trial court made no findings relative to defendant's being in a position of private trust with the victims, the record demonstrated that the victims were friends with defendant's children and that they regularly visited and had overnight stays with his children. *State v. Chaves-Abrego*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 5 (Tenn. Crim. App. Jan. 6, 2021).

20. Application of Factors.

Trial court properly exercised its discretion in ordering defendant to serve a within-range sentence of thirty years for second degree mur-

der because it found that multiple enhancement factors applied; the trial court determined that defendant had a history of criminal convictions or behavior in addition to those necessary to establish the appropriate range, that he had committed murder while on probation for another offense, that he had no hesitation about committing a crime when the risk to human life was high, and that he employed or possessed a firearm during the commission of the murder. *State v. Deberry*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 49 (Tenn. Crim. App. Feb. 10, 2021).

21. Factor Improperly Considered.

Trial court misapplied enhancement factor (7), that the offense involved a victim and was committed to gratify the defendant's desire for pleasure or excitement, to defendant's sentences for aggravated sexual battery, as the state supreme court has held that sexual battery necessarily includes the intent to gratify a desire for pleasure or excitement. *State v. Chaves-Abrego*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 5 (Tenn. Crim. App. Jan. 6, 2021).

23. Sentence Upheld.

Trial court did not err by not imposing the minimum sentences in the range, as the record amply supported the trial court's application of enhancement factor that defendant had a previous history of criminal convictions or behavior in addition to those necessary to establish the appropriate range. *State v. Rudd*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 539 (Tenn. Crim. App. July 31, 2020).

Trial court did not abuse its discretion by denying defendant's request for alternative sentencing and by imposing within-range consecutive sentences when defendant was convicted of possession of heroin with the intent to sell and possession with intent to deliver 0.5 gram or more of cocaine because the court considered the presentence report, defendant's prior drug-related felonies and misdemeanors, defendant's physical and mental conditions, the nature of the offenses, defendant's likelihood of rehabilitation, and the evidence presented. *State v. Johnson*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 545 (Tenn. Crim. App. Aug. 7, 2020).

In a case in which defendant was convicted of, inter alia, especially aggravated robbery, the trial court considered the relevant principles and sentenced defendant to a within-range sentence of eighteen years. As such, defendant was not entitled to relief. *State v. Banks*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 583 (Tenn. Crim. App. Aug. 25, 2020).

Trial court did not err in sentencing defendant to a seven-year sentence in confinement for possession of contraband in a penal institution as the sentence was in range for a Range II, multiple offender and the court properly

applied an enhancement factor for defendant's numerous prior criminal convictions and behavior. The trial court did not abuse its discretion by denying defendant's request for alternative sentencing given defendant's continued drug use despite treatment, continuing to commit crimes, and frequent violations of probation. *State v. Marlow*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 693 (Tenn. Crim. App. Oct. 23, 2020).

Enhancement factors applied to defendant's sentences for rape and aggravated sexual battery, and the trial court imposed a sentence of 30 years, just five years above the minimum punishment for rape, and 10 years, just two years above the minimum punishment for aggravated sexual battery; despite one aggravating factor not applying to the aggravated sexual battery conviction, given the other applicable factors, no abuse of discretion was found. *State v. Chaves-Abrego*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 5 (Tenn. Crim. App. Jan. 6, 2021).

Although defendant argued that the trial court erred in ordering defendant to serve a sentence for aggravated robbery consecutively to the automatic life sentence for a felony murder conviction because the underlying felony, aggravated robbery, was an essential element of the felony murder offense and could not be used as an enhancement factor for the felony murder sentence, the argument was without merit as the statute which addressed enhancement factors for singular offenses and the statute which addressed enhancement requirements for the alignment of sentences for multiple convictions were not in conflict. *State v. Fields*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 47 (Tenn. Crim. App. Feb. 10, 2021).

Trial court did not abuse its discretion by sentencing defendant as a Range III, persistent offender to 12 years for defendant's driving under the influence convictions (which were merged) because defendant had a previous history of criminal convictions, previously failed to comply with the terms of probation, and had no hesitation about committing a crime when the risk to human life was high. While defendant had a rough and tough childhood and mental illness, the court found that the potential for rehabilitation was not great. *State v. Shumacker*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 60 (Tenn. Crim. App. Feb. 24, 2021).

Defendant's 20-year, mid-range sentence for second-degree murder was appropriate because the trial court found that defendant had prior convictions for public intoxication and driving

under the influence, although somewhat minor and remote, and employed a firearm during the commission of the offense. The court gave some mitigation based on defendant's good relationships with older siblings, cessation of drinking alcohol, and work history of manual labor type jobs until defendant was put on disability following a neck surgery. *State v. Olive*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 68 (Tenn. Crim. App. Mar. 3, 2021).

Trial court did not abuse its discretion by enhancing defendant's sentences within the range of punishment upon defendant's convictions for two counts each of aggravated burglary, employing a firearm during the commission of a dangerous felony, and aggravated robbery because the sentences imposed were within the applicable range of punishment for each conviction. Furthermore, the evidence supported the court's application of enhancement factors for defendant's prior convictions and being a leader in the commission of the crimes. *State v. Anderson*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 76 (Tenn. Crim. App. Mar. 5, 2021).

Trial court did not err in sentencing the first defendant to the maximum sentences for aggravated arson, especially aggravated kidnapping, attempted second degree murder, aggravated robbery, and theft and ordering partial consecutive sentences because she was not a mitigate offender; society had to be protected from her and incarceration was necessary; defendant had a leadership role in the events, aimed her gun at the victim and attempted to fire it, and ordered another defendant to use the gun to kill the victim after her failed attempt; and she was not eligible for probation as aggravated robbery and especially aggravated kidnapping were specifically excluded as probatable. *State v. Robinson*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 96 (Tenn. Crim. App. Mar. 17, 2021).

Third defendant's sentence was presumed reasonable because, although the trial court misapplied one enhancement factor, it properly found that he had a history of criminal convictions in addition to those necessary to establish his sentencing range; that he was a leader in the commission of the offense; that the personal injuries inflicted upon the victim or the amount of damage sustained by or taken from the victim was particularly great; that he possessed or employed a firearm during the commission of the offense; and that he was on a condition of release at the time of his arrest. *State v. Robinson*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 96 (Tenn. Crim. App. Mar. 17, 2021).

40-35-115. Multiple convictions.**NOTES TO DECISIONS****ANALYSIS**

3. Consecutive Sentences.
4. —Proper.
5. —Improper.

3. Consecutive Sentences.

In a case in which defendant pleaded guilty to two counts of felon in possession of a firearm, the trial court did not abuse its discretion in imposing consecutive terms based on finding defendant to be a dangerous offender. Defendant was heavily involved in drugs and was carrying firearms because of his involvement with drugs. *State v. Grady*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 18 (Tenn. Crim. App. Jan. 12, 2021).

In a case in which defendant pleaded guilty to two counts of felon in possession of a firearm, the court of criminal appeals noted that defendant's record consisted of eleven convictions, not including his most recent convictions, as well as several terms of incarceration, and having his probation revoked on several occasions. Based on this proof, the trial court did not abuse its discretion in finding defendant had an extensive criminal history or in imposing consecutive terms based on that finding. *State v. Grady*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 18 (Tenn. Crim. App. Jan. 12, 2021).

4. —Proper.

Record supported the imposition of consecutive sentences on the basis of defendant's being convicted of three child rapes and one aggravated sexual battery against the same minor victim. *State v. Morales*, — S.W.3d —, 2012 Tenn. Crim. App. LEXIS 1103 (Tenn. Crim. App. Aug. 29, 2012).

Trial court did not err by imposing consecutive sentences because the record supported its findings regarding defendant's criminal record and probationary status at the time of the crash, and consecutive sentencing was reasonably related to the seriousness of the offense, in which three young people were killed due to defendant's intoxication and recklessness. *State v. Franklin*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 511 (Tenn. Crim. App. July 27, 2020).

While defendant had a relatively minor criminal history prior to the instant offense, her prior DUI conviction was significant because it too involved prescription drug use which resulted in a single car crash and that, combined with the four Class D felony offenses of conviction of a similar nature and her choice to drive after having been in an accident while using

the same prescription drug, satisfied the statutory criteria for consecutive sentencing. *State v. Scates*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 533 (Tenn. Crim. App. July 30, 2020).

Trial court did not abuse its discretion by denying defendant's request for alternative sentencing and by imposing within-range consecutive sentences when defendant was convicted of possession of heroin with the intent to sell and possession with intent to deliver 0.5 gram or more of cocaine because the court considered the presentence report, defendant's prior drug-related felonies and misdemeanors, defendant's physical and mental conditions, the nature of the offenses, defendant's likelihood of rehabilitation, and the evidence presented. *State v. Johnson*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 545 (Tenn. Crim. App. Aug. 7, 2020).

Trial court did not err by ordering that defendant's sentences be served consecutively where the trial court determined that defendant had little to no regard for the lives of the victims, defendant was a dangerous offender, an extended sentence was necessary to protect the public from further criminal conduct by defendant, and the sentences reasonably related to the severity of the offenses. *State v. Jones*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 575 (Tenn. Crim. App. Aug. 25, 2020).

Trial court did not abuse its discretion in imposing partial consecutive service of defendant's sentence because defendant was convicted of 36 felonies, and was convicted of two or more offenses involving the sexual abuse of a minor; he was the victim's father figure from a young age; he used his position of trust to accomplish the abuse through control and manipulation; the abuse involved multiple types of sexual penetration; and extreme damage to the victim's mental and emotional health resulted. *State v. Mason*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 582 (Tenn. Crim. App. Aug. 25, 2020).

Imposition of consecutive sentences was supported by the trial court's determination that defendant was at least twenty-one years older than the victim, the victim needed a father figure and tried to find one in defendant, who abused her, and the victim suffered severe residual physical and mental damage which required treatment and medication. *State v. Gambrell*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 595 (Tenn. Crim. App. Sept. 2, 2020).

Imposition of consecutive sentencing was proper because the record showed that at age 12, defendant began to amass a series of juvenile court adjudications including unlawful possession of a weapon, theft of property, dis-

rupting meeting, criminal impersonation, aggravated burglary, aggravated assault, and a prior violation of probation. *State v. Curry*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 616 (Tenn. Crim. App. Sept. 17, 2020).

Trial court did not abuse its discretion in ordering third defendant to serve her sentences consecutively because the record supported the trial court's finding that she had an extensive record of criminal activity, including numerous misdemeanors, probation violations, a history of illegal drug use, and convictions for multiple felonies as a result of participating in the instant offenses. *State v. Morales*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 619 (Tenn. Crim. App. Sept. 18, 2020).

Trial court properly applied consecutive sentencing factor (6), which was sufficient to support consecutive sentencing, because defendant did not dispute that he was on probation when he committed the offenses against the victim. *State v. Stevens*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 626 (Tenn. Crim. App. Sept. 21, 2020).

Trial court did not abuse its discretion by imposing consecutive sentencing because defendant committed two or more offenses involving sexual abuse of a minor during a two-day period; and the victim stated that she had been emotionally scarred and that the abuse destroyed her life and mental health. *State v. Breeden*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 627 (Tenn. Crim. App. Sept. 21, 2020).

Trial court did not err in imposing partial consecutive sentences for aggravated robbery and theft of property greater than \$1,000 after finding defendant to be an offender whose record of criminal activity was extensive and that defendant committed the offenses while he was on probation. *State v. Grammer*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 769 (Tenn. Crim. App. Nov. 30, 2020).

Trial court did not abuse its discretion in imposing consecutive sentences for murder, as it considered defendant's criminal history and his convictions in the present case, and explained that defendant's prior convictions of domestic violence, his strong R assessment score of "high for violence," and the facts demonstrated defendant's antisocial and criminal behavior. While the trial court noted that running the two life sentences consecutively would be "too much," it concluded that a partial consecutive sentence reasonably related to the defendant's offenses. *State v. Carpenter*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 770 (Tenn. Crim. App. Nov. 30, 2020).

Trial court's findings regarding the dangerous offender classification support consecutive sentences for aggravated robbery, aggravated burglary, and tampering with evidence were fully supported by the record, including defendant's admission to being actively engaged in drug trafficking and a finding that the evidence

of premeditation was overwhelming. *State v. Oeser*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 795 (Tenn. Crim. App. Dec. 11, 2020).

Trial court did not err in ordering defendant to serve his 10-year sentence for aggravated sexual battery of one victim concurrently with his 30-year sentence for rape of a child, but that he serve his 10-year sentence for aggravated sexual battery of the other child consecutive to the 30-year sentence, for a total 40-year sentence; he used his own daughter to gain access to the victims, he did not contest that the physical and mental damage to the victims was an aggravating circumstance, and he had prior convictions for sexual offenses involving children. *State v. Chaves-Abrego*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 5 (Tenn. Crim. App. Jan. 6, 2021).

Defendant failed to show that the trial court abused its discretion in imposing partially consecutive sentences, as defendant's criminal record was abysmal and the record supported the trial court's determination that he was an offender with an extensive record of criminal activity, which was an appropriate statutory basis for consecutive sentencing. *State v. Fleming*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 8 (Tenn. Crim. App. Oct. 13, 2020).

Trial court did not err by imposing consecutive sentencing because he had an extensive criminal history and was on probation in another case when he committed the offense. *State v. Wallace*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 16 (Tenn. Crim. App. Jan. 12, 2021).

Consecutive sentences were warranted following defendant's convictions for facilitation of first-degree, felony murder; attempted especially aggravated robbery; and unlawful possession of a firearm by a convicted felon because the trial court found that defendant's criminal activity was extensive and that defendant was a dangerous offender. The court determined that defendant's conduct was aggravated as defendants shot the victim at close range, reviewed defendant's criminal record, and considered that defendant had killed another person. *State v. Bowen*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 19 (Tenn. Crim. App. Jan. 12, 2021).

Because the trial court found that defendant was a dangerous offender whose behavior indicated little or no regard for human life and no hesitation about committing a crime in which the risk to human life was high, the court had the discretionary authority to order defendant to serve a sentence for aggravated robbery consecutively to the automatic life sentence for a felony murder conviction. *State v. Fields*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 47 (Tenn. Crim. App. Feb. 10, 2021).

Trial court did not abuse its discretion by imposing consecutive sentences upon defendant's convictions for two counts each of aggra-

vated burglary, employing a firearm during the commission of a dangerous felony, and aggravated robbery because the sentences imposed were within the applicable range of punishment for each conviction because the trial court found that defendant was a dangerous offender whose behavior indicated little or no regard for human life and no hesitation about committing a crime in which the risk to human life was high. *State v. Anderson*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 76 (Tenn. Crim. App. Mar. 5, 2021).

Trial court did not err by imposing consecutive sentence because it concluded that consecutive sentencing was necessary to protect the public against further criminal conduct by defendant and that the offense was aggravated based on the evidence presented at trial. Defendant told his girlfriend that he would kill her, he used two semi-automatic weapons, emptied both clips, and fired at least 52 times, and he called his father while in jail and said that he shot at the officers and their dogs. *State v. Pitts*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 71 (Tenn. Crim. App. Mar. 4, 2021).

Trial court did not err in ordering consecutive sentencing for the second defendant because he was a dangerous offender who had little or no regard for human life and no hesitation about committing a crime to which the risk to human life was high; he committed his crime while he was on community corrections; and society had to be protected from him. *State v. Robinson*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 96 (Tenn. Crim. App. Mar. 17, 2021).

Trial court properly ordered the sentences to run consecutively because second defendant had an extensive criminal history, was a dangerous offender whose behavior indicated little regard for human life and no hesitation about committing crimes in which the risk to human life was high, and was serving a community corrections sentence at the time of the offenses for which he was being sentenced. *State v. Williams*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 98 (Tenn. Crim. App. Mar. 19, 2021).

Trial court did not err by imposing consecutive sentences based on its finding that he had an extensive history of criminal activity be-

cause he had four prior felony convictions and six prior misdemeanor convictions, and he was only 20 years old. *State v. Hatchett*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 109 (Tenn. Crim. App. Mar. 24, 2021).

Consecutive sentencing was warranted because the extensive criminal activity and dangerous offender statutory factors were met as defendant's criminal history went back 20-some years; defendants' conduct were aggravated as they shot the victim at a close range for no reason other than they wanted her money; he had been previously convicted of voluntary manslaughter; and the sentences imposed reasonably related to the severity of the crimes for which defendant stood convicted and that confinement would protect the public from further criminal behavior of the defendant. *State v. Bowen*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 149 (Tenn. Crim. App. Apr. 13, 2021).

Trial court did not abuse its discretion by imposing partial consecutive sentencing in defendant's case because he shot the victim after wielding an assault rifle during a confrontation with the victim; he fired shots when law enforcement responded; his conduct was dangerous, presented a high risk to human life, and left the victim lying on the lawn for about two hours before aid could be rendered; and he had previously engaged in dangerous criminal behavior, including pulling a gun on a neighbor and shooting at the neighbor's residence. *State v. Ledford*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 157 (Tenn. Crim. App. Apr. 19, 2021).

5. —Improper.

Consecutive sentences were improperly imposed based upon the conclusion that defendant was a dangerous offender as the trial court failed to make the appropriate findings because, with regard to the severity of the offenses, the trial court remarked generally that it had observed the video with the gun pointed at people; and, with regard to the necessity of a lengthy sentence to protect the public from defendant, the trial court made no finding at all. *State v. Murdock*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 154 (Tenn. Crim. App. Apr. 15, 2021).

40-35-121. Criminal gang offenses — Enhanced punishment — Procedure.

NOTES TO DECISIONS

4. Sufficiency of Evidence.

Evidence was insufficient to support the jury's findings regarding the Criminal Gang Offenses Statute, as the circumstantial evidence failed to go beyond conjecture in estab-

lishing a nexus between defendant's actions and the Aryan Nation. *State v. Wilson*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 122 (Tenn. Crim. App. Mar. 31, 2021).

PART 2 PROCEDURE FOR IMPOSING SENTENCE

40-35-201. Issue of guilt and sentence to be tried separately — Instructing jury on possible sentences.

NOTES TO DECISIONS

5. Questioning.

Trial court properly limited one defendant's cross-examination of a co-defendant regarding the co-defendant's sentencing exposure because the jury was aware that defendants and the co-defendant faced the same charges. There-

fore, any further discussion about the co-defendant's sentencing exposure improperly would have, in effect, made the jury aware of defendants' potential sentencing exposure. *State v. Brown*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 690 (Tenn. Crim. App. Oct. 23, 2020).

40-35-202. Notice of intent to seek enhanced punishment — Statement of enhancement and mitigating factors.

NOTES TO DECISIONS

4. Notice Not Required.

Record clearly established that the State did not file a notice seeking enhanced punishment because it was not seeking enhanced punishment, plus defendant did not receive enhanced

punishment and was given a Range I sentence on each count; thus, defendant was not entitled to relief on this issue. *State v. Morales*, — S.W.3d —, 2012 Tenn. Crim. App. LEXIS 1103 (Tenn. Crim. App. Aug. 29, 2012).

40-35-205. Presentence investigation — Physical or mental examination of defendant.

NOTES TO DECISIONS

1. Resentencing Ordered.

Trial court erred by imposing a sentence on defendant in the absence of a presentence report and therefore the case was remanded to the trial court for a new sentencing hearing

following the preparation of the presentence report. *State v. Anderson*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 15 (Tenn. Crim. App. Jan. 12, 2021).

40-35-210. Imposition of sentence — Evidence to be considered — Presumptive sentence — Sentence explanation.

NOTES TO DECISIONS

ANALYSIS

- 6. Allocution.
- 14. Appellate Review.
- 16. Sentence Held Proper.
- 18. Alternative Sentencing.
- 19. Sentence Upheld.

6. Allocution.

Although defendant was denied her statutory right of allocution, that did not constitute reversible error and she was not entitled to relief because the trial court properly considered and weighed the Parker and Electroplating factors on the record and did not abuse its discretion in

denying defendant judicial diversion. *State v. Tucker*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 754 (Tenn. Crim. App. Nov. 25, 2020).

14. Appellate Review.

Trial court's sentencing decisions were entitled to a presumption of reasonableness, and the court of criminal appeals reviewed defendant's within-range sentence under an abuse of discretion standard with a presumption of reasonableness, because the trial court considered the factors set out in the statute and stated on the record the reasons for the sentence it imposed. *State v. Deberry*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 49 (Tenn. Crim. App. Feb. 10, 2021).

16. Sentence Held Proper.

Trial court properly sentenced defendant as a career offender to six years for violation of the Sex Offender Registry; the sentence was within the appropriate range, and the trial court thoroughly articulated its reasoning, including that defendant had failed to comply with probation numerous times and had another charge in another county while waiting for sentencing on the current charge. *State v. Davis*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 546 (Tenn. Crim. App. Aug. 7, 2020).

In a case in which defendant pleaded guilty to one count of aggravated sexual exploitation of a minor and one count of sexual exploitation of a minor involving over 50 images, the court of criminal appeals concluded that the trial court sentenced defendant to a sentence within the range for each conviction and followed the proper sentencing procedure. The record showed that the trial court carefully considered the evidence, the enhancement and mitigating factors, and the purposes and principles of sentencing prior to imposing a sentence of confinement. *State v. Hernandez*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 551 (Tenn. Crim. App. Aug. 12, 2020).

Trial court properly sentenced defendant to a within range sentence of eight years and six months for aggravated assault and 11 months, 29 days for both reckless endangerment and domestic assault because, as a Range II offender multiple offender, defendant was subject to a sentencing range of six to 10 years for aggravated assault, and 11 months, 29 days for the Class A misdemeanors of reckless endangerment and domestic assault; defendant had a history of criminal convictions in addition to those necessary to establish the range; and he was on release from a federal sentence when he committed the offenses. *State v. Porter*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 654 (Tenn. Crim. App. Oct. 6, 2020).

Trial court did not abuse its discretion by finding that defendant was not an appropriate candidate for full probation after service of the statutory minimum jail sentence, and his sentence of 11 months, 29 days to be served as 120 days in jail followed by supervised probation was upheld for his driving while intoxicated, second offense, conviction; defendant had a prior criminal history that included several felonies and numerous misdemeanors and he had violated several probation sentences in the past. *State v. Groseclose*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 675 (Tenn. Crim. App. Oct. 15, 2020).

Trial court did not err in sentencing defendant to a seven-year sentence in confinement for possession of contraband in a penal institution as the sentence was in range for a Range II, multiple offender and the court properly applied an enhancement factor for defendant's numerous prior criminal convictions and be-

havior. The trial court did not abuse its discretion by denying defendant's request for alternative sentencing given defendant's continued drug use despite treatment, continuing to commit crimes, and frequent violations of probation. *State v. Marlow*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 693 (Tenn. Crim. App. Oct. 23, 2020).

Trial court did not abuse its discretion when sentencing defendant as a Range II, multiple offender for facilitation of first-degree, felony murder and attempted especially aggravated robbery because the sentence imposed by the trial court was within the appropriate range and the trial court considered the required statutory factors, including the evidence presented at trial and the sentencing hearing, the arguments of counsel, the presentence report, defendant's criminal history, and defendant's potential for rehabilitation. *State v. Bowen*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 19 (Tenn. Crim. App. Jan. 12, 2021).

Trial court did not abuse its discretion by imposing the maximum in-range sentence after finding two applicable enhancement factors and no applicable mitigating factors, and finding that defendant's lack of respect for human life rendered him a dangerous criminal, implicitly finding that extended confinement was necessary to protect society from the defendant. *State v. Hawkins*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 33 (Tenn. Crim. App. Jan. 29, 2021).

Trial court properly exercised its discretion in ordering defendant to serve a within-range sentence of thirty years for second degree murder because it found that multiple enhancement factors applied; the trial court determined that defendant had a history of criminal convictions or behavior in addition to those necessary to establish the appropriate range, that he had committed murder while on probation for another offense, that he had no hesitation about committing a crime when the risk to human life was high, and that he employed or possessed a firearm during the commission of the murder. *State v. Deberry*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 49 (Tenn. Crim. App. Feb. 10, 2021).

Trial court did not abuse its discretion by sentencing defendant as a Range III, persistent offender to 12 years for defendant's driving under the influence convictions (which were merged) because defendant had a previous history of criminal convictions, previously failed to comply with the terms of probation, and had no hesitation about committing a crime when the risk to human life was high. While defendant had a rough and tough childhood and mental illness, the court found that the potential for rehabilitation was not great. *State v. Shumacker*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 60 (Tenn. Crim. App. Feb. 24, 2021).

Defendant's 20-year, mid-range sentence for second-degree murder was appropriate because the trial court found that defendant had prior convictions for public intoxication and driving under the influence, although somewhat minor and remote, and employed a firearm during the commission of the offense. The court gave some mitigation based on defendant's good relationships with older siblings, cessation of drinking alcohol, and work history of manual labor type jobs until defendant was put on disability following a neck surgery. *State v. Olive*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 68 (Tenn. Crim. App. Mar. 3, 2021).

Trial court did not abuse its discretion by enhancing defendant's sentences within the range of punishment upon defendant's convictions for two counts each of aggravated burglary, employing a firearm during the commission of a dangerous felony, and aggravated robbery because the sentences imposed were within the applicable range of punishment for each conviction. Furthermore, the evidence supported the court's application of enhancement factors for defendant's prior convictions and being a leader in the commission of the crimes. *State v. Anderson*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 76 (Tenn. Crim. App. Mar. 5, 2021).

Record supported the trial court's application of sentencing enhancement factors, as the trial court considered the relevant factors and stated the reasons for the sentence it imposed. *State v. Somerville*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 116 (Tenn. Crim. App. Mar. 29, 2021).

Trial court did not err in sentencing defendant to 40 years for the facilitation of first-degree, felony murder conviction and 20 years for the attempted especially aggravated robbery conviction because the trial court properly considered defendant's criminal history and the statutory criteria in finding defendant to be a Range II, multiple offender; the trial court reviewed the presentence report, the nature and characteristics of the criminal conduct involved, the applicable enhancement and mitigating factors, and defendant's potential for rehabilitation; and the presentence report listed defendant's criminal history which began in 1995 at the age of 16 and included numerous misdemeanor and felony convictions. *State v. Bowen*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 149 (Tenn. Crim. App. Apr. 13, 2021).

18. Alternative Sentencing.

Defendant's request for alternative sentencing was properly denied and the trial court did

not err in ordering that defendant serve his sentence in confinement because defendant had a history of committing similar theft offenses and had been previously granted probation, which he violated; previous rehabilitation, drug treatment, and grants of probation had not worked; although defendant gave an allocution indicating a desire to support his children and life changes he had made, he had committed similar theft offenses before and after committing the instant theft offense; and he was not entitled to probation, regardless of his remorse or plans for the future. *State v. Loper*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 688 (Tenn. Crim. App. Oct. 22, 2020).

19. Sentence Upheld.

Defendant's 12-year sentence was appropriate as she was subject to a sentencing range of 8-12 years for aggravated robbery; she had a prior history of criminal convictions consisting of sale or possession of felony drugs, misdemeanor stalking and domestic assault, and a driving related offense; no mitigation factors applied; and defendant did not show any remorse or acceptance of responsibility. *State v. Gore*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 736 (Tenn. Crim. App. Nov. 18, 2020).

Defendant's 24-year sentence for second degree murder was appropriate because he treated the victim with exceptional cruelty by stabbing the victim in the neck and an additional 20 times; he abused a position of private trust; he did not act under strong provocation as he disarmed the victim and the threat was terminated; and he did not murder the victim under such unusual circumstances that he did not have a sustained intent to violate the law as he stabbed the victim 21 times. *State v. Gadsden*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 739 (Tenn. Crim. App. Nov. 19, 2020).

Trial court did not err in sentencing the first defendant to the maximum sentences for aggravated arson, especially aggravated kidnapping, attempted second degree murder, aggravated robbery, and theft and ordering partial consecutive sentences because she was not a mitigate offender; society had to be protected from her and incarceration was necessary; defendant had a leadership role in the events, aimed her gun at the victim and attempted to fire it, and ordered another defendant to use the gun to kill the victim after her failed attempt; and she was not eligible for probation as aggravated robbery and especially aggravated kidnapping were specifically excluded as probable. *State v. Robinson*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 96 (Tenn. Crim. App. Mar. 17, 2021).

PART 3 SENTENCES

40-35-302. Misdemeanor sentencing — Rehabilitative program credits — Probation — Supervision of defendants on probation.

NOTES TO DECISIONS

9. Sentence Proper.

Trial court did not abuse its discretion by finding that defendant was not an appropriate candidate for full probation after service of the statutory minimum jail sentence, and his sentence of 11 months, 29 days to be served as 120 days in jail followed by supervised probation was upheld for his driving while intoxicated,

second offense, conviction; defendant had a prior criminal history that included several felonies and numerous misdemeanors and he had violated several probation sentences in the past. *State v. Groseclose*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 675 (Tenn. Crim. App. Oct. 15, 2020).

40-35-303. Probation — Eligibility — Terms.

NOTES TO DECISIONS

ANALYSIS

- 10. Defendant Not Eligible for Probation.
- 12. Denial of Probation Proper.
- 13. Denial of Probation Improper.
- 15. Denial of Alternative Sentencing Appropriate.
- 18. Probation Appropriately Granted.

10. Defendant Not Eligible for Probation.

Trial court did not err in sentencing the first defendant to the maximum sentences for aggravated arson, especially aggravated kidnapping, attempted second degree murder, aggravated robbery, and theft and in ordering partial consecutive sentences because she was not a mitigated offender; society had to be protected from her and incarceration was necessary; defendant had a leadership role in the events, aimed her gun at the victim and attempted to fire it, and ordered another defendant to use the gun to kill the victim after her failed attempt; and she was not eligible for probation as aggravated robbery and especially aggravated kidnapping were specifically excluded as probatable. *State v. Robinson*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 96 (Tenn. Crim. App. Mar. 17, 2021).

12. Denial of Probation Proper.

Trial court did not abuse its discretion by denying defendant's request for alternative sentencing and by imposing within-range consecutive sentences when defendant was convicted of possession of heroin with the intent to sell and possession with intent to deliver 0.5 gram or more of cocaine because the court considered the presentence report, defendant's prior drug-related felonies and misdemeanors, defendant's physical and mental conditions, the

nature of the offenses, defendant's likelihood of rehabilitation, and the evidence presented. *State v. Johnson*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 545 (Tenn. Crim. App. Aug. 7, 2020).

Although defendant was eligible for probation as the actual sentence imposed for each of his convictions of attempted aggravated sexual exploitation of a minor and attempted sexual exploitation of a minor was 10 years or less, and the offenses for which defendant was sentenced were not specifically excluded by statute, defendant did not qualify for favorable status consideration because he pled guilty as a Range II multiple offender on count 2 of attempted sexual exploitation of a minor; he had a lengthy history of viewing child pornography; and he was at an elevated risk for reoffending and a poor prospect for probation. *State v. Durick*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 669 (Tenn. Crim. App. Oct. 13, 2020).

Trial court did not err in ordering that defendant's entire sentence for aggravated assault be served in confinement and in denying full probation because the trial court needed to avoid depreciating the seriousness of the offense; the sentence of incarceration for the entire sentence and the denial of probation was compliant with the purposes and principles of sentencing; defendant violated probation twice in 2018, within a span of four months, and also committed a new offense which resulted in a conviction; and defendant lacked the potential for rehabilitation. *State v. Kirby*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 759 (Tenn. Crim. App. Nov. 30, 2020).

Defendant did not establish that the trial court abused its discretion by denying defendant an alternative sentence because the evidence established that defendant committed a drug offense while released on bond and tested

positive for marijuana and prescription pills during a drug screening at defendant's presentence report meeting, also while on bond. Defendant's conduct of committing offenses while on bond showed a poor amenability to rehabilitations. *State v. Norris*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 800 (Tenn. Crim. App. Dec. 17, 2020).

Trial court did not abuse its discretion by ordering defendant to serve his entire sentence for violating the sex offender registry in incarceration because, although defendant was eligible for alternative sentencing, he was not a favorable candidate for alternative sentencing given his many prior offenses and several probation violations. *State v. Theus*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 11 (Tenn. Crim. App. Jan. 8, 2021).

13. Denial of Probation Improper.

Trial court did not consider a sentence of full probation to be a form of punishment, and because the trial court failed to consider the factors articulated in case law and no evidence supported a finding of the need for deterrence, the trial court erred by ordering confinement. *State v. Walkington*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 734 (Tenn. Crim. App. Nov. 19, 2020).

15. Denial of Alternative Sentencing Appropriate.

In a case in which defendant was convicted of one count of aggravated statutory rape, although a favorable candidate for alternative sentencing, he was properly denied alternative sentencing based upon depreciating the seriousness of the offense, deterrence, and the circumstances surrounding the offense because, over a period of months, defendant engaged in sexual activity with the victim, who was developmentally delayed and vulnerable, on three occasions other than the offense for which he was convicted; and, although he was acquitted of the three other acts, the verdict of acquittal did not prevent the sentencing court from considering defendant's conduct underlying the acquitted charge as it was proven by a preponderance of the evidence. *State v. Powell*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 518 (Tenn. Crim. App. July 27, 2020).

Trial court did not err by ordering defendant to serve his effective sentence of eight years and six months in confinement because he was not considered a favorable candidate for alternative sentencing options as measures less restrictive than confinement had frequently or recently been applied unsuccessfully to defendant because he was on release from a federal sentence when he committed the offenses; and, although he had been released on parole in other cases, which he successfully completed, he continued to commit crimes. *State v. Porter*,

— S.W.3d —, 2020 Tenn. Crim. App. LEXIS 654 (Tenn. Crim. App. Oct. 6, 2020).

Defendant's request for alternative sentencing was properly denied and the trial court did not err in ordering that defendant serve his sentence in confinement because defendant had a history of committing similar theft offenses and had been previously granted probation, which he violated; previous rehabilitation, drug treatment, and grants of probation had not worked; although defendant gave an allocution indicating a desire to support his children and life changes he had made, he had committed similar theft offenses before and after committing the instant theft offense; and he was not entitled to probation, regardless of his remorse or plans for the future. *State v. Loper*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 688 (Tenn. Crim. App. Oct. 22, 2020).

Trial court did not err in sentencing defendant to a seven-year sentence in confinement for possession of contraband in a penal institution as the sentence was in range for a Range II, multiple offender and the court properly applied an enhancement factor for defendant's numerous prior criminal convictions and behavior. The trial court did not abuse its discretion by denying defendant's request for alternative sentencing given defendant's continued drug use despite treatment, continuing to commit crimes, and frequent violations of probation. *State v. Marlow*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 693 (Tenn. Crim. App. Oct. 23, 2020).

Trial court did not abuse its discretion in denying defendant an alternative sentence and in ordering defendant to serve defendant's sentence in incarceration because the trial court found that defendant had several prior felonies, no ties to the county, and had absconded before even registering as a sex offender as required after defendant's guilty plea. Furthermore, the record reflected that the trial court engaged in a careful consideration of the facts and the law. *State v. McLeod*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 720 (Tenn. Crim. App. Nov. 10, 2020).

Trial court did not abuse its discretion in denying an alternative sentence because it considered and placed great weight on defendant's criminal record, especially his 2011 convictions for aggravated robbery and attempted aggravated robbery, which the court characterized as crimes of violence; it expressed its concern that defendant was now being sentenced for robbery, the same type of offense for which defendant had been previously convicted and incarcerated in the Tennessee Department of Correction; and it expressed frustration that defendant kept needing repeated chances to change supporting the need for incarceration to deter defendant from future criminal activity and to protect the public. *State v. Clabough*, — S.W.3d

—, 2021 Tenn. Crim. App. LEXIS 95 (Tenn. Crim. App. Mar. 16, 2021).

Trial court properly denied alternative sentencing to defendant because the court considered the evidence presented at the guilty plea hearing, the presentence report, and the evidence presented at the sentencing hearing, as well as the principles of sentencing and the available sentencing alternatives, defendant had many prior offenses and several violations of probation, measures less restrictive than confinement had frequently been applied to defendant without success, and the record reflected that the trial court properly engaged in a careful and detailed consideration of the facts and the law. *State v. Ingram*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 115 (Tenn. Crim. App. Mar. 29, 2021).

40-35-304. Restitution as condition for probation — Petition to modify — Civil judgment for nonpayment — Procedure.

NOTES TO DECISIONS

ANALYSIS

2. Amount of Restitution.
7. Ability to Pay.

2. Amount of Restitution.

Order of restitution, after defendant pleaded guilty to arson in the burning of a mobile home, was inappropriate, so that remand for reconsideration was necessary, because there was insufficient evidence presented by the owner of the mobile home to establish the value of the mobile home when the mobile home was burned. The trial court could not determine the owner's loss with reliability because the owner's testimony regarding the actual loss at the time of the offense was uncertain as the owner had not been to the mobile home in a few years. *State v. Thomas*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 31 (Tenn. Crim. App. Jan. 28, 2021).

7. Ability to Pay.

Although the trial court properly found that restitution should be a condition of the plea

Evidence overcame the presumption of defendant's favorability for an alternative sentence as he was at a high risk for reoffending if placed on probation; and he would be a tremendous risk to himself or the public. *State v. Ledford*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 157 (Tenn. Crim. App. Apr. 19, 2021).

18. Probation Appropriately Granted.

Trial court appropriately sentenced defendant to six years of probation for perjury because it was within the statutorily authorized range permitted for Class E felonies, which was between one and six years. *State v. Sullivan*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 22 (Tenn. Crim. App. Jan. 14, 2021).

agreement, remand was required for the trial court to make findings on the issue of the victim's pecuniary loss, defendant's financial resources, defendant's present and future ability to pay, and a restitution amount that could be paid during the sentencing period. *State v. Thomas*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 40 (Tenn. Crim. App. Feb. 1, 2021).

Because the trial court did not give proper consideration to defendant's financial resources and his future ability to pay when ordering defendant to pay restitution remand was necessary for the consideration of defendant's resources and future ability to pay, as well as for a determination of a reasonable amount of restitution, including the setting of a monthly payment plan, if appropriate. *State v. Griffith*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 62 (Tenn. Crim. App. Mar. 1, 2021).

40-35-308. Modification, removal or release from conditions of probation.

NOTES TO DECISIONS

ANALYSIS

4. Revocation Proper.
6. Reinstatement of Sentence.

4. Revocation Proper.

Trial court did not abuse its discretion by revoking defendant's probation because defendant admitted he had violated the conditions of

his release by obtaining new criminal charges for drug possession and by failing to report to his probation officer; once the trial court revoked defendant's probation, it had the authority to order defendant to serve his sentence in confinement. *State v. Richens*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 704 (Tenn. Crim. App. Oct. 30, 2020).

Decision to sentence defendant to confinement was within the trial court's statutory authority, after it revoked defendant's probation because, in a statement to police, defendant admitted to following the victim from a store and pulling his gun out when the man exited the victim's sister's car. Defendant then grabbed the victim by the hair and bit her during an argument, and his arrest for aggravated assault was one of the grounds supporting the violation of probation warrant. *State v. Williams*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 45 (Tenn. Crim. App. Feb. 8, 2021).

6. Reinstatement of Sentence.

Trial court did not abuse its discretion by ordering defendant to serve the remainder of his sentence in confinement because defendant never reported to his probation officer after his release and was arrested approximately two months after his release from jail; the trial court acknowledged and considered defendant's substance abuse and mental health issues and his need for treatment *State v. Richens*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 704 (Tenn. Crim. App. Oct. 30, 2020).

Trial court did not abuse its discretion by ordering defendant to serve the remainder of his sentence in confinement because defendant never reported to his probation officer after his release and was arrested approximately two months after his release from jail; the trial court acknowledged and considered defendant's substance abuse and mental health issues and

his need for treatment *State v. Richens*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 704 (Tenn. Crim. App. Oct. 30, 2020).

Trial court did not err in revoking defendant's probation and in requiring him to serve his sentence in confinement because, while on probation, defendant was charged with aggravated trespass after illegally entering into a family's residence; defendant conceded on appeal that the trial court had substantial evidence to revoke his probation; defendant previously violated his probation and then violated probation again less than one month after he was reinstated to it by being charged with a new criminal offense; and defendant failed to take his medication, as he assured the court that he would. *State v. Carter*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 732 (Tenn. Crim. App. Nov. 18, 2020).

Trial court did not err in finding that defendant violated the terms of her probation, in revoking her probation, and in ordering her to serve her sentence in confinement because she was alleged to have violated her probation by failing several drug screens and by failing to report to her probation officer as instructed; defendant previously violated her probation twice; and defendant was not addressing her addiction while on an alternative sentence, and she could receive help in confinement. *State v. Fletcher*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 91 (Tenn. Crim. App. Mar. 15, 2021).

Trial court did not err in finding that defendant violated the terms of his probation, in revoking his probation, and in ordering him to serve his sentence in confinement because he informed his probation officer at his report date on November 6, 2019, that he did not think he would pass a drug screen; and he left the probation office without permission before giving a required drug screen. *State v. Perryman*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 92 (Tenn. Crim. App. Mar. 15, 2021).

40-35-310. Revocation of suspension of sentence — Resentence to community-based alternative to incarceration.

NOTES TO DECISIONS

ANALYSIS

3. Reinstatement of Sentence.
4. Incarceration After Revocation.
8. Revocation Proper.
13. Confinement.

3. Reinstatement of Sentence.

Trial court did not err in revoking defendant's probation and in requiring him to serve his sentence in confinement because, while on probation, defendant was charged with aggra-

vated trespass after illegally entering into a family's residence; defendant conceded on appeal that the trial court had substantial evidence to revoke his probation; defendant previously violated his probation and then violated probation again less than one month after he was reinstated to it by being charged with a new criminal offense; and defendant failed to take his medication, as he assured the court that he would. *State v. Carter*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 732 (Tenn. Crim. App. Nov. 18, 2020).

Trial court did not err in finding that defendant violated the terms of her probation, in revoking her probation, and in ordering her to serve her sentence in confinement because she was alleged to have violated her probation by failing several drug screens and by failing to report to her probation officer as instructed; defendant previously violated her probation twice; and defendant was not addressing her addiction while on an alternative sentence, and she could receive help in confinement. *State v. Fletcher*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 91 (Tenn. Crim. App. Mar. 15, 2021).

Trial court did not err in finding that defendant violated the terms of his probation, in revoking his probation, and in ordering him to serve his sentence in confinement because he informed his probation officer at his report date on November 6, 2019, that he did not think he would pass a drug screen; and he left the probation office without permission before giving a required drug screen. *State v. Perryman*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 92 (Tenn. Crim. App. Mar. 15, 2021).

4. Incarceration After Revocation.

When defendant acknowledged that defendant had violated the terms of defendant's probation at the revocation hearing, the trial court did not abuse its discretion by revoking defendant's probation and by choosing that defendant serve the balance of defendant's sentence in confinement from among the options available after the court found that defendant had violated the terms of defendant's probation. *State v. Felices*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 610 (Tenn. Crim. App. Sept. 17, 2020).

Trial court's ordering defendant serve defendant's original sentence in confinement upon revocation of defendant's probation was appropriate because, before imposing confinement, the court considered defendant's criminal history, defendant's underlying conviction for robbery, the robbery victim's impact statement, and defendant's amenability to continued probation. *State v. Fulton*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 656 (Tenn. Crim. App. Oct. 6, 2020).

Trial court did not abuse its discretion in revoking defendant's probation and ordering him to serve the balance of his sentence in confinement because, at the revocation hearing, defendant admitted that he had violated the terms of his probation; it was within the trial court's authority to order defendant to serve his original sentence upon revoking his probation; and an accused, already on probation, was not entitled to a second grant of probation or another form of alternative sentencing. *State v. Bunch*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 77 (Tenn. Crim. App. Mar. 4, 2021).

8. Revocation Proper.

Trial court properly revoked defendant's probation and ordered her to serve the balance of her effective 10-year sentence in confinement because defendant was not denied due process where defendant did not deny that she violated her probation, the trial court did not prohibit defense counsel or defendant from arguing mitigation, the trial court has been more than patient with defendant—it was defendant's fourth probation violation. *State v. Daniels*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 484 (Tenn. Crim. App. July 16, 2020).

Trial court did not abuse its discretion when it revoked defendant's probation and ordered her original sentence into execution, where the trial court found that defendant failed a drug test, failed to report to her probation officer, and failed to complete a day reporting center program while on probation. Defendant also admitted that she violated probation by using drugs, which alone was substantial evidence to support the trial court's revocation of probation. *State v. Thompson*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 541 (Tenn. Crim. App. Aug. 3, 2020).

There was sufficient evidence to establish by a preponderance of the evidence that defendant violated the terms of his probation, including testimony from a detective supporting the trial court's finding that defendant sold cocaine to a criminal informant. And the fact that the weapon was found in a safe within defendant's bedroom and defendant had a key to that safe, allowed the trial court to determine that defendant constructively possessed the weapon. *State v. Meriweather*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 544 (Tenn. Crim. App. Aug. 6, 2020).

Trial court did not abuse its discretion by revoking defendant's probation and ordering him to serve his original three-year sentence in confinement because the record indicated that defendant failed to report to his probation officer, tested positive for marijuana, and failed to complete any community service hours. Defendant admitted to each of the violations at the revocation hearing. *State v. Taylor*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 586 (Tenn. Crim. App. Aug. 27, 2020).

Trial court did not abuse its discretion in revoking defendant's probation because the court found that defendant violated the terms of defendant's probation in that an incident report showed that defendant was arrested while on probation for aggravated assault, a police officer detailed the facts leading to defendant's arrest, defendant admitted to wrestling with the victim in a domestic dispute, and the victim suffered injuries. *State v. Fulton*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 656 (Tenn. Crim. App. Oct. 6, 2020).

Trial court did not abuse its discretion in revoking defendant's probation and ordering

him to serve the balance of his sentence in confinement. The trial court's oral findings showed that it initially imposed an alternative sentence of split confinement and that defendant violated the terms of his probation after his release from confinement. *State v. Bowery*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 660 (Tenn. Crim. App. Oct. 8, 2020).

Trial court properly revoked defendant's probation and ordered him to serve the remainder of his sentence because defendant failed to report for his probation appointments, was not living at his last known address, and was serving a separate probation violation for his failure to appear, exhibiting a pattern of difficulty with compliance. *State v. Davis*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 681 (Tenn. Crim. App. Oct. 16, 2020).

Trial court did not abuse its discretion by revoking defendant's probation because defendant admitted he had violated the conditions of his release by obtaining new criminal charges for drug possession and by failing to report to his probation officer; once the trial court revoked defendant's probation, it had the authority to order defendant to serve his sentence in confinement. *State v. Richens*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 704 (Tenn. Crim. App. Oct. 30, 2020).

Trial court did not abuse its discretion in finding by a preponderance of the evidence that defendant violated the conditions of probation and revoking his probation and to causing defendant to commence the execution of the judgment as originally entered, as the evidence showed that defendant was arrested and that he had been inconsistent in reporting to his

probation officer, who could not find him. *State v. Person*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 751 (Tenn. Crim. App. Nov. 25, 2020).

Trial court did not violate due process principles by revoking defendant's probation on a basis not alleged in the violation warrant, as the trial court did not base its decision solely upon defendant's taking and refusing to return the victim's keys but found that defendant violated the terms his probation by behaving in an assaultive, abusive, threatening, and intimidating manner toward the victim when he struck the victim. *State v. Morgan*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 28 (Tenn. Crim. App. Jan. 20, 2021).

Preponderance of the evidence supported the trial court's finding that defendant violated probation by altering her pay stubs to created federal income tax withholdings that the company forwarded to the IRS on her behalf and crediting herself for payments toward a personal loan made to her by her employer that she had not made in violation of T.C.A. § 39-14-103(a). *State v. Jewell*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 85 (Tenn. Crim. App. Mar. 11, 2021).

13. Confinement.

Trial court did not abuse its discretion when it ordered defendant to serve her original ten-year sentence, as the proof at the probation revocation hearing showed that defendant, while on probation, committed a second theft from her employer which was almost identical to the one in this case. *State v. Jewell*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 85 (Tenn. Crim. App. Mar. 11, 2021).

40-35-311. Procedure to revoke suspension of sentence or probation — Use of validated risk and needs assessment.

NOTES TO DECISIONS

ANALYSIS

6. Discretion of Court.
9. Revocation Proper.
10. —Proof of Violation.
11. Revocation Improper.
12. Reinstatement of Sentence.

6. Discretion of Court.

Trial court was not required to obtain the validated risk and needs assessment after defendant made the trial court aware that his failure to comply with the terms of probation was due to his emotional and drug problems because the decision to consider the assessment, as well as the decision to request an updated assessment, was discretionary. *State v. Bunch*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 77 (Tenn. Crim. App. Mar. 4, 2021).

9. Revocation Proper.

Trial court properly revoked defendant's probation and ordered her to serve the balance of her effective 10-year sentence in confinement because defendant was not denied due process where defendant did not deny that she violated her probation, the trial court did not prohibit defense counsel or defendant from arguing mitigation, the trial court has been more than patient with defendant—it was defendant's fourth probation violation. *State v. Daniels*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 484 (Tenn. Crim. App. July 16, 2020).

Trial court did not abuse its discretion when it revoked defendant's probation and ordered her original sentence into execution, where the trial court found that defendant failed a drug test, failed to report to her probation officer, and failed to complete a day reporting center program while on probation. Defendant also ad-

mitted that she violated probation by using drugs, which alone was substantial evidence to support the trial court's revocation of probation. *State v. Thompson*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 541 (Tenn. Crim. App. Aug. 3, 2020).

Trial court did not abuse its discretion in revoking defendant's probation and ordering him to serve the balance of his sentence in confinement. The trial court's oral findings showed that it initially imposed an alternative sentence of split confinement and that defendant violated the terms of his probation after his release from confinement. *State v. Bowery*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 660 (Tenn. Crim. App. Oct. 8, 2020).

Trial court properly revoked defendant's probation and ordered him to serve the remainder of his sentence because defendant failed to report for his probation appointments, was not living at his last known address, and was serving a separate probation violation for his failure to appear, exhibiting a pattern of difficulty with compliance. *State v. Davis*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 681 (Tenn. Crim. App. Oct. 16, 2020).

Trial court did not abuse its discretion by revoking defendant's probation because defendant admitted he had violated the conditions of his release by obtaining new criminal charges for drug possession and by failing to report to his probation officer; once the trial court revoked defendant's probation, it had the authority to order defendant to serve his sentence in confinement. *State v. Richens*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 704 (Tenn. Crim. App. Oct. 30, 2020).

Trial court did not abuse its discretion by revoking defendant's community corrections sentence and ordering him to serve the remainder of his sentence in confinement because the record contained overwhelming evidence that he had violated the conditions of his community corrections sentence, as he tested positive for THC, failed to make weekly meetings, failed to be at home when checked upon, and committed the offense of DUI. *State v. Gwaltney*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 718 (Tenn. Crim. App. Nov. 10, 2020).

Trial court did not abuse its discretion in revoking defendant's probation and ordering him to serve the balance of his sentence in confinement because, at the revocation hearing, defendant admitted that he had violated the terms of his probation; it was within the trial court's authority to order defendant to serve his original sentence upon revoking his

probation; and an accused, already on probation, was not entitled to a second grant of probation or another form of alternative sentencing. *State v. Bunch*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 77 (Tenn. Crim. App. Mar. 4, 2021).

Because of defendant's history of noncompliance with the rules and conditions of the drug court program, the drug court did not abuse its discretion in removing defendant from the drug court program and the trial court did not abuse its discretion in affirming the removal and ordering defendant's sentences into execution. Defendant had a forbidden contact with a co-defendant, missed curfew at a sober living facility, and fled to Georgia for months until defendant was arrested and returned to Tennessee. *State v. Roy*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 155 (Tenn. Crim. App. Apr. 16, 2021).

10. —Proof of Violation.

There was sufficient evidence to establish by a preponderance of the evidence that defendant violated the terms of his probation, including testimony from a detective supporting the trial court's finding that defendant sold cocaine to a criminal informant. And the fact that the weapon was found in a safe within defendant's bedroom and defendant had a key to that safe, allowed the trial court to determine that defendant constructively possessed the weapon. *State v. Meriweather*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 544 (Tenn. Crim. App. Aug. 6, 2020).

Trial court did not abuse its discretion by revoking defendant's probation and ordering him to serve his original three-year sentence in confinement because the record indicated that defendant failed to report to his probation officer, tested positive for marijuana, and failed to complete any community service hours. Defendant admitted to each of the violations at the revocation hearing. *State v. Taylor*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 586 (Tenn. Crim. App. Aug. 27, 2020).

Trial court did not abuse its discretion in revoking defendant's probation because the court found that defendant violated the terms of defendant's probation in that an incident report showed that defendant was arrested while on probation for aggravated assault, a police officer detailed the facts leading to defendant's arrest, defendant admitted to wrestling with the victim in a domestic dispute, and the victim suffered injuries. *State v. Fulton*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 656 (Tenn. Crim. App. Oct. 6, 2020).

Trial court did not abuse its discretion by revoking defendant's Community Corrections and requiring him to serve his eight-year sentence in confinement because the evidence showed that defendant's GPS was cut off and was found lying beside the road, defendant failed to report as instructed, and defendant had absconded twice from Community Corrections. *State v. Whitson*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 702 (Tenn. Crim. App. Oct. 30, 2020).

Trial court did not abuse its discretion in determining that defendant violated multiple conditions of his probation where an officer testified that defendant failed to report on numerous dates and failed a drug screen, a second officer testified that he attempted to arrest defendant on an outstanding warrant but defendant evaded arrest and when the second officer caught up with defendant, he found a bag of marijuana and methamphetamine near defendant and drug paraphernalia on his person, and a third officer testified that he was assaulted by defendant at the jail. *State v. Bugg*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 733 (Tenn. Crim. App. Nov. 18, 2020).

Trial court did not abuse its discretion by revoking defendant's probation where defendant admitted under oath that he engaged in further criminal conduct and other evidence presented at the hearing clearly established that defendant was nude, trespassing in a public place, and engaged in a sexual act for which he claimed to have paid proved that he violated the conditions of his release. *State v. Waite*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 10 (Tenn. Crim. App. Jan. 8, 2021).

Criminal court properly revoked defendant's probation for defendant's violation of conditions of defendant's probation and ordered defendant to serve defendant's original sentence in confinement because the court found that defendant engaged in unlawful behavior related to defendant's defrauding a businessman and that defendant failed to attend a mandated theft cessation class. *State v. Simpson*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 20 (Tenn. Crim. App. Jan. 13, 2021).

11. Revocation Improper.

Despite the State's arguments to the contrary, defendant was not remotely afforded a probation revocation hearing and did not present any evidence and thus, defendant's due process rights were undoubtedly violated by the revocation of his probation. *State v. Hernandez*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 699 (Tenn. Crim. App. Oct. 29, 2020).

12. Reinstatement of Sentence.

When defendant acknowledged that defendant had violated the terms of defendant's probation at the revocation hearing, the trial court did not abuse its discretion by revoking defendant's probation and by choosing that defendant serve the balance of defendant's sentence in confinement from among the options available after the court found that defendant had violated the terms of defendant's probation. *State v. Felices*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 610 (Tenn. Crim. App. Sept. 17, 2020).

Trial court did not err in revoking defendant's probation and in requiring him to serve his sentence in confinement because, while on probation, defendant was charged with aggravated trespass after illegally entering into a family's residence; defendant conceded on appeal that the trial court had substantial evidence to revoke his probation; defendant previously violated his probation and then violated probation again less than one month after he was reinstated to it by being charged with a new criminal offense; and defendant failed to take his medication, as he assured the court that he would. *State v. Carter*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 732 (Tenn. Crim. App. Nov. 18, 2020).

Trial court did not err in finding that defendant violated the terms of her probation, in revoking her probation, and in ordering her to serve her sentence in confinement because defendant was alleged to have violated her probation by failing several drug screens and by failing to report to her probation officer as instructed; defendant previously violated her probation twice; defendant was not addressing her addiction while on an alternative sentence, and she could receive help in confinement. The trial court's decision to sentence the Defendant to confinement after finding that she violated her probation was within its statutory authority to make. *State v. Fletcher*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 91 (Tenn. Crim. App. Mar. 15, 2021).

Trial court did not err in finding that defendant violated the terms of his probation, in revoking his probation, and in ordering him to serve his sentence in confinement because he informed his probation officer at his report date on November 6, 2019, that he did not think he would pass a drug screen; and he left the probation office without permission before giving a required drug screen. *State v. Perryman*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 92 (Tenn. Crim. App. Mar. 15, 2021).

40-35-313. Probation — Conditions — Discharge and dismissal — Expunction from official records — Fee.

NOTES TO DECISIONS

ANALYSIS

15. Judicial Diversion Properly Denied.
17. Judicial Diversion Not Properly Considered.
18. Appeal.

15. Judicial Diversion Properly Denied.

After defendant entered a best interest plea to statutory rape, the trial court properly considered defendant's failure to accept responsibility for defendant's actions when determining that defendant's amenability to correction weighed against diversion. It also was within the trial court's discretion to conclude that the egregious nature of the offense—including posting nude photos of the victim on social media—and defendant's lack of amenability to correction outweighed the factors in favor of diversion. *State v. Rankins*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 589 (Tenn. Crim. App. Sept. 1, 2020).

Trial court did not abuse its discretion in denying diversion after defendant pleaded guilty to facilitation of attempted especially aggravated robbery and possession of marijuana with intent to sell because the court concluded that defendant's lack of amenability to correction, the circumstances of the offense, defendant's social history, the deterrence value of the punishment, and public interests weighed against diversion. Defendant's charges resulted from the death of one participant and the hospitalization of others with gunshot wounds. *State v. Thomas*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 590 (Tenn. Crim. App. Sept. 1, 2020).

Trial court did not abuse its discretion in denying judicial diversion after defendant pled guilty to aggravated statutory rape where it engaged in a very detailed and thorough examination of the Electroplating factors prior to denying diversion primarily on the basis of the circumstances of the offense, having been entrusted a member of the family and using that position to sexually abuse the victim, who suffered unfathomable mental anguish. *State v. Gambrell*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 595 (Tenn. Crim. App. Sept. 2, 2020).

Trial court did not err in denying defendant's request for judicial diversion following his guilty plea to child abuse. Despite the fact that the record failed to reflect that the trial court considered and weighed all the necessary factors in considering its decision, the record was sufficient for de novo review and the appellate court found that diversion was properly denied

where defendant minimized his culpability for the offense and blamed his reaction on the victim's misbehavior, defendant continued to use marijuana, the facts were an egregious use of force on a young child. *State v. Baron*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 722 (Tenn. Crim. App. Nov. 13, 2020).

Trial court did not abuse its discretion by relying on defendant's prior delinquent acts to deny judicial diversion because the State offered evidence that defendant was in state custody and confined at a youth development center when he committed the instant offenses and the presentence report stated that defendant was adjudicated to have committed a delinquent act or acts as a juvenile that would constitute a felony if committed by an adult, and defendant admitted engaging in prior delinquent behavior. *State v. Robertson*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 750 (Tenn. Crim. App. Nov. 20, 2020).

Trial court properly considered and weighed the Parker and Electroplating factors on the record and did not abuse its discretion in denying defendant judicial diversion. In denying judicial diversion, the trial court considered the Parker and Electroplating factors and several mitigating factors proposed by defense counsel and found that defendant was a 41-year-old woman at the time of the offense, she had received disability benefits since graduating high school, was considered "low functioning," and received substantial assistance from her family members, she had poor physical and social history and was taking steps to address her anger problems, but the deterrence value was high to defendant as well as to the public. *State v. Tucker*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 754 (Tenn. Crim. App. Nov. 25, 2020).

Trial court did not abuse its discretion in denying judicial diversion to defendant because, despite defendant's lack of a criminal record, certain factors weighed against defendant, including defendant's amenability to correction, the circumstances of defendant's pawning the jewelry of an elderly victim at the nursing facility where defendant worked, the deterrence value, and the public interest. Furthermore, defendant gave varying accounts regarding defendant's responsibility for the crime and refused to identify any other employees involved. *State v. Wright*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 781 (Tenn. Crim. App. Dec. 4, 2020).

Trial court did not abuse its discretion when it denied defendant judicial diversion because, over the course of multiple months, defendant

burglarized different people, stealing their property. Thereafter, when defendant was released into the community while awaiting adjudication of the charges in the case, defendant was arrested for possession of methamphetamine. *State v. Norris*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 800 (Tenn. Crim. App. Dec. 17, 2020).

Trial court did not abuse its discretion by denying defendant judicial diversion after defendant, a probation officer, pleaded guilty to felony sexual contact with a probationer because the court considered the required factors and identified the relevant factors which the court applied, including the fact that defendant abused defendant's position of power, authority, and control over the victim for defendant's own sexual gratification. *State v. Thomas*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 44 (Tenn. Crim. App. Jan. 31, 2021).

17. Judicial Diversion Not Properly Considered.

Where defendant pled guilty to aggravated burglary and indecent exposure, the trial court

failed to properly review and assess his request for diversion, as it did not differentiate between diversion and probation but noted defendant spent a significant portion of his childhood in foster care, had a minimal criminal history, and his explanation of the crime was not credible, but failed to mention how these factors weighed either in favor of or against the granting of diversion or how much weight the trial court was placing on each. *State v. Wilson*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 743 (Tenn. Crim. App. Nov. 19, 2020).

18. Appeal.

Defendant's appeal of his conviction of two counts of aggravated perjury was dismissed for lack of jurisdiction because he did not have a right to appeal as he was granted judicial diversion and therefore no judgment of conviction was entered which was required for an appeal under Tenn. R. App. P. 3. *State v. Begtrup*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 775 (Tenn. Crim. App. Dec. 2, 2020).

PART 4 APPEAL OF SENTENCE

40-35-401. Appeal of sentence by defendant — Time for filing — Grounds — Determination — Standard.

NOTES TO DECISIONS

ANALYSIS

5. Review.
8. —Sentence Upheld on Appeal.

5. Review.

8. —Sentence Upheld on Appeal.

Defendant's 24-year sentence for second degree murder was appropriate because he treated the victim with exceptional cruelty by stabbing the victim in the neck and an additional 20 times; he abused a position of private trust; he did not act under strong provocation as he disarmed the victim and the threat was terminated; and he did not murder the victim under such unusual circumstances that he did not have a sustained intent to violate the law as he stabbed the victim 21 times. *State v. Gadsden*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 739 (Tenn. Crim. App. Nov. 19, 2020).

Trial court properly exercised its discretion in ordering defendant to serve a within-range sentence of thirty years for second degree murder because it found that multiple enhancement factors applied; the trial court determined that defendant had a history of criminal convictions or behavior in addition to those necessary to establish the appropriate range, that he had

committed murder while on probation for another offense, that he had no hesitation about committing a crime when the risk to human life was high, and that he employed or possessed a firearm during the commission of the murder. *State v. Deberry*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 49 (Tenn. Crim. App. Feb. 10, 2021).

Trial court properly exercised its discretion in ordering defendant to serve a within-range sentence of thirty years for second degree murder because it found that multiple enhancement factors applied; the trial court determined that defendant had a history of criminal convictions or behavior in addition to those necessary to establish the appropriate range, that he had committed murder while on probation for another offense, that he had no hesitation about committing a crime when the risk to human life was high, and that he employed or possessed a firearm during the commission of the murder. *State v. Deberry*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 49 (Tenn. Crim. App. Feb. 10, 2021).

Trial court did not err in sentencing defendant to 40 years for the facilitation of first-degree, felony murder conviction and 20 years for the attempted especially aggravated robbery conviction because the trial court properly

considered defendant's criminal history and the statutory criteria in finding defendant to be a Range II, multiple offender; the trial court reviewed the presentence report, the nature and characteristics of the criminal conduct involved, the applicable enhancement and mitigating factors, and defendant's potential for

rehabilitation; and the presentence report listed defendant's criminal history which began in 1995 at the age of 16 and included numerous misdemeanor and felony convictions. *State v. Bowen*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 149 (Tenn. Crim. App. Apr. 13, 2021).

PART 5 RELEASE AND PAROLE

40-35-501. Release eligibility status — Calculations. [Effective until July 1, 2021. See the version effective on July 1, 2021.]

NOTES TO DECISIONS

ANALYSIS

6. Determination of Sentence.
7. Release Eligibility Date.

6. Determination of Sentence.

Because the defendant's sentence was 10 years or less and because rape was not listed as an offense for which probation was not available, the trial court was required to consider probation as a sentencing alternative, and its failure to do so justified a remand for a new sentencing hearing. *State v. Wyse*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 687 (Tenn. Crim. App. Oct. 20, 2020).

40-35-501. Release eligibility status — Calculations. [Effective on July 1, 2021. See the version effective until July 1, 2021.]

NOTES TO DECISIONS

ANALYSIS

6. Determination of Sentence.
7. Release Eligibility Date.

6. Determination of Sentence.

Because the defendant's sentence was 10 years or less and because rape was not listed as an offense for which probation was not available, the trial court was required to consider probation as a sentencing alternative, and its failure to do so justified a remand for a new sentencing hearing. *State v. Wyse*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 687 (Tenn. Crim. App. Oct. 20, 2020).

7. Release Eligibility Date.

As to defendant's conviction of aggravated assault, both the State and the trial court misstated the law; under T.C.A. § 40-35-501(k)(7), a person convicted of aggravated assault that results in death (not that involves the use of a deadly weapon) must serve 75 percent (not 70 percent) of the sentence imposed by the trial court. As the judgment did not reflect the verdict announced or the sentence imposed by the trial court, remand was required. *State v. Burgess*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 88 (Tenn. Crim. App. Mar. 12, 2021).

7. Release Eligibility Date.

As to defendant's conviction of aggravated assault, both the State and the trial court misstated the law; under T.C.A. § 40-35-501(k)(7), a person convicted of aggravated assault that results in death (not that involves the use of a deadly weapon) must serve 75 percent (not 70 percent) of the sentence imposed by the trial court. As the judgment did not reflect the verdict announced or the sentence imposed by the trial court, remand was required. *State v. Burgess*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 88 (Tenn. Crim. App. Mar. 12, 2021).

CHAPTER 36

COMMUNITY CORRECTIONS

PART 1 GENERAL PROVISIONS

40-36-106. Eligible offenders.

NOTES TO DECISIONS

ANALYSIS

10. Alternative Sentencing Denied.
12. Revocation of Sentence.
17. Findings.

10. Alternative Sentencing Denied.

Trial court did not abuse its discretion by denying defendant's request for alternative sentencing and by imposing within-range consecutive sentences when defendant was convicted of possession of heroin with the intent to sell and possession with intent to deliver 0.5 gram or more of cocaine because the court considered the presentence report, defendant's prior drug-related felonies and misdemeanors, defendant's physical and mental conditions, the nature of the offenses, defendant's likelihood of rehabilitation, and the evidence presented. *State v. Johnson*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 545 (Tenn. Crim. App. Aug. 7, 2020).

12. Revocation of Sentence.

Trial court did not abuse its discretion by revoking defendant's community corrections

sentence and ordering him to serve the remainder of his sentence in confinement because the record contained overwhelming evidence that he had violated the conditions of his community corrections sentence, as he tested positive for THC, failed to make weekly meetings, failed to be at home when checked upon, and committed the offense of DUI. *State v. Gwaltney*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 718 (Tenn. Crim. App. Nov. 10, 2020).

17. Findings.

In an action by the State challenging the imposition of a community corrections sentence, reversal was required because it was not completely clear what the trial court's rational for placing defendant on community corrections was, as the trial court immediately ordered defendant to serve his sentence on community corrections without making any additional findings after the State pointed out that defendant did not qualify for probation. *State v. Thornton*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 26 (Tenn. Crim. App. Jan. 15, 2021).

CHAPTER 38

VICTIMS' RIGHTS

PART 1 VICTIMS' BILL OF RIGHTS

40-38-103. Rights of crime victims — Generally.

NOTES TO DECISIONS

2. Victim Photographs.

Trial court did not err by admitting a photograph of the victim taken while he was alive because the State offered it to show the victim's appearance before his death. The trial court did not err abuse its discretion because it consid-

ered the light in the background and the victim's black clothing but found there was nothing unfairly prejudicial about the photograph. *State v. Griffin*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 110 (Tenn. Crim. App. Mar. 24, 2021).

CHAPTER 39

OFFENDER REGISTRATION AND MONITORING

PART 2 TENNESSEE SEXUAL OFFENDER AND VIOLENT
SEXUAL OFFENDER REGISTRATION, VERIFICATION AND
TRACKING ACT OF 2004

reporting period — Review of
decisions to deny termination of
reporting requirements — Life-
time registration.

SECTION.

40-39-207. Request for termination of registra-
tion requirements — Tolling of

PART 2 TENNESSEE SEXUAL OFFENDER AND VIOLENT SEXUAL OFFENDER REGISTRATION,
VERIFICATION AND TRACKING ACT OF 2004

**40-39-207. Request for termination of registration requirements —
Tolling of reporting period — Review of decisions to deny termination
of reporting requirements — Lifetime registration.**

(a)(1) Except as otherwise provided in subdivision (a)(3), unless a plea was taken in conjunction with § 40-35-313, no sooner than ten (10) years after termination of active supervision on probation, parole, or any other alternative to incarceration, or no sooner than ten (10) years after discharge from incarceration without supervision, an offender required to register under this part may file a request for termination of registration requirements with TBI headquarters in Nashville. If the person is required to register under this part due to a plea taken in conjunction with § 40-35-313, an offender required to register under this part may file a request for termination of registration upon successful completion of a term of judicial diversion pursuant to § 40-35-313 and upon receiving an order from a court of competent jurisdiction signifying the successful completion of the term of judicial diversion and the dismissal of charges pursuant to § 40-35-313.

(2) Notwithstanding subdivision (a)(1), if a court of competent jurisdiction orders that an offender's records be expunged pursuant to § 40-32-101, and the offense being expunged is an offense eligible for expunction under § 40-32-101, the TBI shall immediately remove the offender from the SOR and the offender's records shall be removed as provided in § 40-39-209.

(3) Notwithstanding subdivision (a)(1), no sooner than three (3) years after termination of active supervision on probation, parole, or any other alternative to incarceration, or no sooner than three (3) years after discharge from incarceration without supervision, an offender required to register under this part due to conviction under § 39-16-408 may file a request for termination of registration requirements with TBI headquarters in Nashville.

(4) Notwithstanding subdivision (a)(1), if a court of competent jurisdiction grants an offender's petition, filed pursuant to § 40-39-218, for termination of the requirements imposed by this part based on the offender's status as a victim of a human trafficking offense, as defined by § 39-13-314, sexual offense, under title 39, chapter 13, part 5, or domestic abuse, as defined by § 36-3-601, the Tennessee bureau of investigation shall, immediately upon receiving a copy of the order, remove the offender from the SOR.

(b) Upon receipt of the request for termination, the TBI shall review documentation provided by the offender and contained in the offender's file and the SOR, to determine whether the offender has complied with this part. In addition, the TBI shall conduct fingerprint-based state and federal criminal history checks, to determine whether the offender has been convicted of any additional sexual offenses, as defined in § 40-39-202, or violent sexual offenses, as defined in § 40-39-202.

(c) The TBI shall remove an offender's name from the SOR and notify the offender that the offender is no longer required to comply with this part if it is determined that:

(1) The offender has successfully completed a term of judicial diversion, pursuant to § 40-35-313, for an offense under § 39-13-505 or § 39-13-506(a) or (b), for which the person is required to register under this part;

(2) The offender previously entered a term of judicial diversion, pursuant to § 40-35-313, prior to May 24, 2019, for the offense for which the person is required to register under this part and subsequently successfully completes the term of judicial diversion; or

(3) The offender has not been convicted of any additional sexual offense or violent sexual offense during the ten-year period and the offender has substantially complied with this part and former part 1 of this chapter [repealed].

(d) If it is determined that the offender has been convicted of any additional sexual offenses or violent sexual offenses during the ten-year period or has not substantially complied with this part and former part 1 of this chapter [repealed], the TBI shall not remove the offender's name from the SOR and shall notify the offender that the offender has not been relieved of the provisions of this part.

(e) If an offender is denied a termination request based on substantial noncompliance, the offender may petition again for termination no sooner than five (5) years after the previous denial.

(f) Immediately upon the failure of a sexual offender to register or otherwise substantially comply with the requirements established by this part, the running of the offender's ten-year reporting period shall be tolled, notwithstanding the absence or presence of any warrant or indictment alleging a violation of this part.

(g)(1) An offender whose request for termination of registration requirements is denied by a TBI official may petition the chancery court of Davidson County or the chancery court of the county where the offender resides, if the county is in Tennessee, for review of the decision. The review shall be on the record used by the TBI official to deny the request. The TBI official who denied the request for termination of registration requirements may submit an affidavit to the court detailing the reasons the request was denied.

(2) An offender required to register under this part shall continue to comply with the registration, verification and tracking requirements for the life of that offender, if that offender:

(A) Has one (1) or more prior convictions for a sexual offense, as defined in § 40-39-202, regardless of when the conviction or convictions occurred;

(B) Has been convicted of a violent sexual offense, as defined in § 40-39-202; or

(C) Has been convicted of an offense in which the victim was a child of twelve (12) years of age or less.

(3) For purposes of subdivision (g)(2)(A):

(A) "Prior conviction" means that the person serves and is released or discharged from, or is serving, a separate period of incarceration or supervision for the commission of a sexual offense prior to or at the time of committing another sexual offense;

(B) "Prior conviction" includes convictions under the laws of any other state, government or country that, if committed in this state, would constitute a sexual offense. If an offense in a jurisdiction other than this state is not identified as a sexual offense in this state, it shall be considered a prior conviction if the elements of the offense are the same as the elements for a sexual offense; and

(C) "Separate period of incarceration or supervision" includes a sentence to any of the sentencing alternatives set out in § 40-35-104(c)(3)-(9). A sexual offense shall be considered as having been committed after a separate period of incarceration or supervision if the sexual offense is committed while the person was:

(i) On probation, parole or community correction supervision for a sexual offense;

(ii) Incarcerated for a sexual offense;

(iii) Assigned to a program whereby the person enjoys the privilege of supervised release into the community, including, but not limited to, work release, educational release, restitution release or medical furlough for a sexual offense; or

(iv) On escape status from any correctional institution when incarcerated for a sexual offense.

(h)(1) Any offender required to register pursuant to this chapter because the offender was convicted of the offense of statutory rape under § 39-13-506 and the offense was committed prior to July 1, 2006, may file a request for termination of registration requirements with TBI headquarters in Nashville, if the offender would not be required to register if the offense was committed on or after July 1, 2006.

(2) Upon receipt of the request for termination, the TBI shall review documentation provided by the offender and contained in the offender's file and the SOR, to determine whether the offender would not be required to register if the offender committed the same offense on or after July 1, 2006. In addition, the TBI shall conduct fingerprint-based state and federal criminal history checks, to determine whether the offender has been convicted of any additional sexual offenses, as defined in § 40-39-202, or violent sexual offenses, as defined in § 40-39-202.

(3) If it is determined that the offender would not be required to register if the offense was committed on or after July 1, 2006, that the offender has not been convicted of any additional sexual offenses or violent sexual offenses and that the offender has substantially complied with this part and any previous versions of this part, the TBI shall remove the offender's name from the SOR and notify the offender that the offender is no longer required to comply with this part.

(4) If it is determined that the offender would still be required to register even if the statutory rape had been committed on or after July 1, 2006, or that the offender has been convicted of any additional sexual offenses or violent sexual offenses during the period of registration or has not substantially complied with this part and the previous versions of this part, the TBI shall not remove the offender's name from the SOR and shall notify the offender that the offender has not been relieved of this part.

(5) An offender whose request for termination of registration requirements is denied by a TBI official may petition the chancery court of Davidson County or the chancery court of the county where the offender resides, if the county is in this state, for review of the decision. The review shall be on the record used by the TBI official to deny the request. The TBI official who denied the request for termination of registration requirements may submit an affidavit to the court detailing the reasons the request was denied.

(i)(1)(A) If a person convicted of an offense was not required to register as an offender prior to August 1, 2007, because the person was convicted, discharged from parole or probation supervision or discharged from incarceration without supervision prior to January 1, 1995, for an offense now classified as a sexual offense, the person may file a request for termination of registration requirements with TBI headquarters in Nashville, no sooner than five (5) years from August 1, 2007, or the date the person first registered with the SOR, whichever date is later.

(B) The procedure, criteria for removal and other requirements of this section shall otherwise apply to an offender subject to removal after five (5) years as specified in subdivision (i)(1)(A).

(2) If a person convicted of an offense was not required to register as an offender prior to August 1, 2007, because the person was convicted, discharged from parole or probation supervision or discharged from incarceration without supervision prior to January 1, 1995, for an offense now classified as a violent sexual offense, the person shall continue to comply with the registration, verification and tracking requirements for the life of that offender.

(3)(A) If a person convicted of an offense was not required to register as an offender prior to July 1, 2010, for an offense now classified as a sexual offense, the person may file a request for termination of registration requirements with TBI headquarters in Nashville, no sooner than five (5) years from July 1, 2010, or the date the person first registered with the SOR, whichever date is later.

(B) The procedure, criteria for removal and other requirements of this section shall otherwise apply to an offender subject to removal after five (5) years as specified in subdivision (i)(3)(A).

(C) If a person convicted of an offense was not required to register as an offender prior to July 1, 2010, for an offense now classified as a violent sexual offense, the person shall continue to comply with the registration, verification and tracking requirements for the life of that offender.

(4) Unless otherwise authorized by law, a person required to register as any form of a sexual offender in this state due to a qualifying offense from another jurisdiction which is classified as a sexual offense in this state may apply for removal from the registry pursuant to subdivision (a)(1) following

the later of:

(A) Ten (10) years from the date of termination of active supervision or probation, parole or any other alternative to incarceration, or after discharge from incarceration without supervision; or

(B) Five (5) years after being added to the Tennessee sexual offender registry.

(j)(1) Violent juvenile sexual offenders who are currently registered as such and who receive a subsequent adjudication in juvenile court or a court having juvenile court jurisdiction for one of the offenses listed in § 40-39-202(29) or a crime that if committed in this state would require registration shall be required to register for life. Information concerning the violent juvenile sexual offender who commits a subsequent offense listed in § 40-39-202(29), which was formerly considered confidential under § 40-39-206(e), shall be deemed public information once the offender reaches the offender's eighteenth birthday.

(2) Violent juvenile sexual offenders who are currently registered as such and who, upon reaching the age of eighteen (18), are convicted of a sexual offense as set out in § 40-39-202(20) or a violent sexual offense as set out in § 40-39-202(31) shall be required to register for life. Information concerning the violent juvenile sexual offender who commits a subsequent offense listed in § 40-39-202(20) or § 40-39-202(31), which was formerly considered confidential under § 40-39-206(e), shall be deemed public information.

(3) Violent juvenile sexual offenders who reach the age of twenty-five (25), and who have not been adjudicated or convicted of a subsequent qualifying offense as set out in subdivisions (j)(1) and (2) or any offense set out in subdivision (g)(2)(C), shall be eligible for termination from the SOR. Upon reaching the age of twenty-five (25), the violent juvenile sexual offender may apply for removal from the SOR by use of a form created by the TBI. The form will contain a statement, sworn to by the offender under the penalty of perjury, that the offender has not been convicted of or adjudicated delinquent of any of the offenses set out in subdivisions (j)(1) and (2) or any offense set out in subdivision (g)(2)(C).

(4) TBI shall also conduct fingerprint-based state and federal criminal history checks to determine whether the violent juvenile sexual offender has been convicted of or adjudicated on any prohibited crimes as set out in subdivisions (j)(1) and (2) or any offense set out in subdivision (g)(2)(C), including crimes committed in other jurisdictions.

(5) If the violent juvenile sexual offender has not been convicted or adjudicated delinquent in any of the prohibited crimes, the offender shall be removed from the sex offender registry.

History.

Acts 2004, ch. 921, § 1; 2005, ch. 316, § 1; 2006, ch. 890, § 18; 2008, ch. 1164, § 7; 2010, ch. 1138, § 11; 2011, ch. 483, § 15; 2014, ch. 744, § 2; 2014, ch. 770, §§ 2, 3; 2015, ch. 284, §§ 2, 3; 2015, ch. 469, § 2; 2019, ch. 502, §§ 1, 2.

Compiler's Notes. This section is set out in this Advance Code Service to correct the designation of (g)(3), it was advertently designated as a second (g)(2) in the bound volume.

40-39-211. Residential and work restrictions.**NOTES TO DECISIONS****ANALYSIS**

1. Residing with Minor.
2. Vagueness.

1. Residing with Minor.

Indictment was properly admitted as evidence because, to be convicted of violating the sex offender registry, the State had to prove that defendant's victim in the case requiring him to be on the sex offender registry was a minor under the age of 13, and the indictment demonstrated that the victim was approximately 11 years old when attempted sexual abuse conviction occurred; and defendant did not show how the danger of unfair prejudice substantially outweighed the indictment's probative value as the certified copy of the conviction admitted as evidence reduced the likelihood that the indictment would be used for an improper purpose because it demonstrated he

was actually convicted of the lesser offense of attempted sexual abuse. *State v. Sullivan*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 22 (Tenn. Crim. App. Jan. 14, 2021).

2. Vagueness.

In an action for violation of T.C.A. § 40-39-211(d)(1)(B), the trial court properly rejected defendant's vagueness challenge and revoked his probation for failure to comply with that section, as an ordinary person would understand that choosing to remain within 1,000 feet of a playground where minor children were present, whether eating or not, was not a specific or legitimate reason for being there as proscribed by that section and thus, defendant should not have stayed in the restaurant to eat where there was an indoor playground attached. *State v. Collier*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 23 (Tenn. Crim. App. Jan. 14, 2021).

TITLE 43**AGRICULTURE AND HORTICULTURE****CHAPTER 1****DEPARTMENT OF AGRICULTURE****PART 1 COMMISSIONER—DUTIES—GENERAL PROVISIONS****43-1-113. Definition of agriculture.****NOTES TO DECISIONS****1. Agriculture.**

Trial court properly dismissed a county's complaint to enforce its zoning ordinance as applied to a commercial wedding event venue operated in a rural residential area because the venue was engaged in the commercial production of farm products and nursery stock within the meaning of the applicable statutes; the use of the property was in keeping with the legislature's obvious intent to allow the necessary

supplementation of farming income with income from related activities as long as such activities were secondary to the commercial production of farm products and nursery stock. because the property owner testified that the event venue was successful due to the aesthetic appearance of the farm and the farming operation itself. *Jefferson Cty. v. Wilmoth Family Props., LLC*, — S.W.3d —, 2021 Tenn. App. LEXIS 37 (Tenn. Ct. App. Feb. 2, 2021).

TITLE 44
ANIMALS AND ANIMAL HUSBANDRY
CHAPTER 8
FENCES AND CONFINEMENT

PART 4 RUNNING AT LARGE

44-8-413. Civil liability for injury caused by dogs.

NOTES TO DECISIONS

1. Construction.

Trial court erred in granting summary judgment in favor of a store in a pedestrian's action for injuries she received while trying to avoid being attacked by two dogs that escaped from the store because, while the dogs were legally owned by the store's owner, there was ample evidence upon which a factfinder could connect the dogs' presence to the store's benefit; they

were used in marketing for the store, they were allowed to roam freely when in the store, and they enhanced the customer experience, and, the statutory context dictated that the meaning of "owner" was related to the owner of the premises, not the owner of the dogs. *Folad v. Quillco, LLC*, — S.W.3d —, 2020 Tenn. App. LEXIS 568 (Tenn. Ct. App. Dec. 15, 2020).

TITLE 47
COMMERCIAL INSTRUMENTS AND TRANSACTIONS

CHAPTER.

**32. RESIDENTIAL CLOSING FUNDS DISTRIBUTION ACT
 OF 2005.**

CHAPTER 14
INTEREST RATES GENERALLY

47-14-109. When interest accrues.

NOTES TO DECISIONS

1. Prejudgment Interest.

In awarding prejudgment interest, the amount due to the construction company was ascertainable on November 30, 2014, because that was when the company first provided the building owners with a ledger of the costs expended and invoices that reflected the total amount due for the construction under the

stipulated sum contract and the cost-plus contract; further, the trial court did not make any findings that would support the determination to commence prejudgment interest earlier, on November 10. *Liberty Constr. Co., LLC v. Curry*, — S.W.3d —, 2020 Tenn. App. LEXIS 468 (Tenn. Ct. App. Oct. 21, 2020).

47-14-121. Interest on judgments — Rate.**NOTES TO DECISIONS****9. Post-judgment — Interest.**

Despite the omission of the 1.5 percent amount in the trial court's order, which appellee forfeited by failing to raise in the trial court, appellee was entitled to statutory inter-

est accruing from the date of the enrollment of judgment in Tennessee. *Wolf Org., Inc. v. Tng Contrs., LLC*, — S.W.3d —, 2020 Tenn. App. LEXIS 379 (Tenn. Ct. App. Aug. 21, 2020).

47-14-122. Interest on judgments — Computation.**NOTES TO DECISIONS****8. Illustrative Cases.**

Trial court erred by denying the wife post-judgment interest because the husband's \$16,000 payment to the court clerk's office did not relieve him for paying the interest as it was

not unconditional, because he tendered the funds to obtain a stay of execution. *Himes v. Himes*, — S.W.3d —, 2021 Tenn. App. LEXIS 162 (Tenn. Ct. App. Apr. 20, 2021).

47-14-123. Prejudgment interest.**NOTES TO DECISIONS****ANALYSIS****7. Illustrative Cases.****8. Damages.****7. Illustrative Cases.**

Denial of prejudgment interest was proper where the trial court noted considerations of equity in its decision in addition to its findings that the amount of the obligation was uncertain and that the existence of the obligation was disputed on legitimate grounds. *Highlands Physicians, Inc. v. Wellmont Health Sys.*, — S.W.3d —, 2020 Tenn. App. LEXIS 430 (Tenn. Ct. App. Sept. 25, 2020).

In awarding prejudgment interest, the amount due to the construction company was ascertainable on November 30, 2014, because that was when the company first provided the building owners with a ledger of the costs expended and invoices that reflected the total amount due for the construction under the stipulated sum contract and the cost-plus contract; further, the trial court did not make any findings that would support the determination to commence prejudgment interest earlier, on November 10. *Liberty Constr. Co., LLC v. Curry*, — S.W.3d —, 2020 Tenn. App. LEXIS 468 (Tenn. Ct. App. Oct. 21, 2020).

Because the appellate court did not know the rate which the trial court used in awarding a landlord prejudgment interest when a commercial tenant stopped paying rent on leased space months before the end of the lease term and the landlord was unsuccessful in its attempts to find a replacement tenant, and because the appellate court modified the amount of late fees to which the landlord was entitled, prejudgment interest on remand was to be calculated on the landlord's recalculated damages award using the annual rate of ten percent. *Loans Yes v. Kroger Limited Partnership I*, — S.W.3d —, 2020 Tenn. App. LEXIS 486 (Tenn. Ct. App. Oct. 30, 2020).

8. Damages.

Trial court erred in holding that an uninsured automobile insurance policy precluded an award of prejudgment interest where the policy contained a list of specific exclusions that did not include prejudgment interest, and thus, it was presumed that the policy exclusions were restricted to the enumerated items. Moreover, by its plain language, the policy provided for the payment of all damages, and under judicial authority, prejudgment interest was considered damages. *Lewis v. State Farm*, — S.W.3d —, 2020 Tenn. App. LEXIS 492 (Tenn. Ct. App. Nov. 5, 2020).

CHAPTER 18

CONSUMER PROTECTION

PART 1 CONSUMER PROTECTION ACT OF 1977

47-18-102. Purposes.

NOTES TO DECISIONS

3. Real Estate Sales.

Facts supported the conclusion that appellees, who were licensed contractors, were not acting in their personal capacity when they sold the property to appellants, given that appellees rarely used the property for their personal benefit and spent only a token amount of time

there; as appellees were acting in a business capacity during the sale of the property to appellants, the trial court erred in holding that the Tennessee Consumer Protection Act did not apply. *Hall v. Tabb*, — S.W.3d —, 2021 Tenn. App. LEXIS 116 (Tenn. Ct. App. Mar. 25, 2021).

47-18-103. Part definitions.

NOTES TO DECISIONS

2. Consumer.

As purchasers of real property from the sellers, appellants met the definition of consumers

under the Tennessee Consumer Protection Act. *Hall v. Tabb*, — S.W.3d —, 2021 Tenn. App. LEXIS 116 (Tenn. Ct. App. Mar. 25, 2021).

47-18-104. Unfair or deceptive acts prohibited.

NOTES TO DECISIONS

5. Intent.

Trial court properly found that there was a breach of contract and dismissed a customer's Tennessee Consumer Protection Act (TCPA) claim because proof of the contract did not necessarily establish a violation of the TCPA and, while the contractor performed a mono-

lithic pour of the concrete rather than a multiple pour (two pours) as required by the plans, it was not intended to be deceptive or fraudulent, but rather was a misinterpretation of the engineer's design. *Mini Sys. v. Alexander*, — S.W.3d —, 2020 Tenn. App. LEXIS 530 (Tenn. Ct. App. Nov. 24, 2020).

47-18-110. Limitations of actions.

NOTES TO DECISIONS

4. Running of Statute.

Trial court properly dismissed a company's lawsuit against a contractor's owners for violation of the licensing statute because the statute of limitations had run due to the company's failure to properly serve the owners, and any

actions allegedly taken by the owners, regardless of alleged bad faith, had no bearing on the company's own ability to toll the running of the statute of limitations. *Cored, LLC v. Hatcher*, — S.W.3d —, 2020 Tenn. App. LEXIS 444 (Tenn. Ct. App. Oct. 6, 2020).

CHAPTER 32

RESIDENTIAL CLOSING FUNDS DISTRIBUTION ACT OF 2005

SECTION.

47-32-104. Disbursement of loan funds to settlement agent.

ment agent from escrow or settlement account.

47-32-105. Disbursement of funds by settle-

47-32-104. Disbursement of loan funds to settlement agent.

(a) A mortgage lender, mortgage loan broker, mortgage loan servicer, or other person shall, at or before loan closing, cause disbursement of loan funds, in one (1) of the forms identified in § 47-32-102(3), to the settlement agent.

(b) In any transaction in which the borrower may exercise a right of rescission under the federal Truth-in-Lending Act, compiled in 15 U.S.C. § 1601 et seq., and applicable federal regulations and interpretations, a mortgage lender, mortgage loan broker, mortgage loan servicer, or other person, shall cause disbursement of loan funds to the settlement agent not later than the first business day after the expiration of the rescission period.

History.

Acts 2005, ch. 273, § 5.

102(3)" for "47-32-102(2)" in subsection (a) to correct an internal reference.

Compiler's Notes. Substituted "47-32-

47-32-105. Disbursement of funds by settlement agent from escrow or settlement account.

(a) No settlement agent shall disburse any funds from an escrow or settlement account in connection with a mortgage loan transaction identified in § 47-32-103(a), until:

(1) Disbursement of loan funds, designated for said mortgage loan, has been received by the settlement agent;

(2) Such additional funds necessary to be provided by the borrower or other third party to fully fund the transaction have been received. All additional funds required by this subdivision (a)(2) in excess of one thousand dollars (\$1,000), shall be provided to the settlement agent in one (1) of the forms identified in § 47-32-102(3); and

(3) All documents required to complete the transaction have been executed and are deemed suitable for recording.

(b) In any transaction in which the borrower may exercise a right of rescission under the federal Truth-in-Lending Act, compiled in 15 U.S.C. § 1601 et seq., and the settlement agent has received loan funds prior to or on the first business day after the time the rescission right has expired, the settlement agent shall not disburse any settlement proceeds earlier than the first day after the expiration of the rescission period, and the settlement agent has determined that the borrower has not exercised the right of rescission.

History.

Acts 2005, ch. 273, § 6.

102(3)” for “47-32-102(2)” in subdivision (a)(2) to correct an internal reference.

Compiler’s Notes. Substituted “47-32-

CHAPTER 50
MISCELLANEOUS PROVISIONS

47-50-103. Written contracts prima facie evidence of consideration.

NOTES TO DECISIONS

ANALYSIS

- 1. Pleading and Proof.
- 4. Adequate Consideration.

1. Pleading and Proof.

Testimony showed that there was no consideration given to the beneficiary in exchange for her promise to provide the balance of the life insurance proceeds to appellants after her payment of the decedent’s funeral expenses, and therefore the trial court did not err by finding that the alleged contract between the beneficiary of the decedent’s life insurance policy and appellants, the decedent’s children and two other individuals, was not enforceable. Thacker v. Wilbanks, — S.W.3d —, 2020 Tenn. App. LEXIS 425 (Tenn. Ct. App. Sept. 23, 2020).

While the trial court erred in finding that the “additional consideration” provision of the parties’ buy-sell agreement was void and unen-

forceable, the corporation failed to overcome the statutory presumption that consideration existed for its portion of the agreement since it made an enforceable promise to the seller in exchange for his agreement to sell his ownership interest and leave the company, the manager signed on behalf of the corporation. Lance v. Alcoa Hotel Hosp., LLC, — S.W.3d —, 2020 Tenn. App. LEXIS 507 (Tenn. Ct. App. Nov. 16, 2020).

4. Adequate Consideration.

Entry of judgment on an appeal bond for attorney fees was appropriate because the bond was not nullified for lack of consideration as the surety’s issuance of the bond amounted to adequate consideration in that the surety was under no legal obligation to issue the bond on the appealing party’s behalf. Nelson v. Justice, — S.W.3d —, 2021 Tenn. App. LEXIS 91 (Tenn. Ct. App. Mar. 9, 2021).

TITLE 48
SECURITIES, CORPORATIONS AND ASSOCIATIONS
NONPROFIT CORPORATIONS

CHAPTER 53
PURPOSES AND POWERS

PART 1 PURPOSES AND POWERS OF NONPROFIT CORPORATIONS

48-53-104. Ultra vires actions.

NOTES TO DECISIONS

2. Standing.

Condominium unit owner’s challenges to the authority of the board of managers of a non-profit development management association failed because the owner did not initiate the

challenges to the board’s authority in the form of derivative proceeding and because the owner did not have standing to bring such a proceeding as the owner’s ownership interest only comprised 4.7 percent of the total voting power

within the association. Kirby Parkway Profl Condo. Ass'n v. Cindy-Jarvis Ltd. L.P., — S.W.3d —, 2020 Tenn. App. LEXIS 598 (Tenn. Ct. App. Dec. 30, 2020).

CHAPTER 56

MEMBERS AND MEMBERSHIPS

PART 4 DERIVATIVE SUITS

48-56-401. Derivative suits.

NOTES TO DECISIONS

1. Standing.

Condominium unit owner's challenges to the authority of the board of managers of a non-profit development management association failed because the owner did not initiate the challenges to the board's authority in the form of derivative proceeding and because the owner

did not have standing to bring such a proceeding as the owner's ownership interest only comprised 4.7 percent of the total voting power within the association. Kirby Parkway Profl Condo. Ass'n v. Cindy-Jarvis Ltd. L.P., — S.W.3d —, 2020 Tenn. App. LEXIS 598 (Tenn. Ct. App. Dec. 30, 2020).

LIMITED LIABILITY COMPANIES

CHAPTER 215

MEMBERS AND MEMBERSHIP INTERESTS

48-215-101. Nature of a membership interest and statement of interest owned.

NOTES TO DECISIONS

1. Interest in Specific Property.

Trial court erred in awarding a wife a lien to secure the wife's alimony in solido payment against various parcels of real property because the parcels were owned by limited liability

companies which the husband owned and not by the husband, individually. Barton v. Barton, — S.W.3d —, 2020 Tenn. App. LEXIS 502 (Tenn. Ct. App. Nov. 10, 2020).

CHAPTER 249

TENNESSEE REVISED LIMITED LIABILITY COMPANY ACT

PART 1 GENERAL PROVISIONS

48-249-102. Chapter definitions.

NOTES TO DECISIONS

1. Officer.

Appellee was acting as an officer given that the operating agreement delegated to him the rights and powers to manage and control the affairs of the limited liability company (LLC), namely, the sale of the property; T.C.A. § 48-

249-115(g) allowed for indemnification of officers to the same extent as a responsible person and thus appellee was entitled to indemnification from the LLC. King v. Chase, — S.W.3d —, 2021 Tenn. App. LEXIS 104 (Tenn. Ct. App. Mar. 17, 2021).

PART 4 MANAGEMENT

48-249-401. Management of LLC.

NOTES TO DECISIONS

1. Illustrative Cases.

Appellee was acting as an officer given that the operating agreement delegated to him the rights and powers to manage and control the affairs of the limited liability company (LLC), namely, the sale of the property; T.C.A. § 48-

249-115(g) allowed for indemnification of officers to the same extent as a responsible person and thus appellee was entitled to indemnification from the LLC. King v. Chase, — S.W.3d —, 2021 Tenn. App. LEXIS 104 (Tenn. Ct. App. Mar. 17, 2021).

PART 5 ADMISSION OF MEMBERS — MEMBERSHIP INTERESTS — TRANSFEREES AND CREDITORS OF MEMBERS

48-249-502. Nature of membership interest and statement of interest owned.

NOTES TO DECISIONS

ANALYSIS

- 1. Marital Property.
- 2. Lien.

LLC and the net martial business interests were not accurately computed. Barton v. Barton, — S.W.3d —, 2020 Tenn. App. LEXIS 502 (Tenn. Ct. App. Nov. 10, 2020).

1. Marital Property.

When a husband's interest in a limited liability company (LLC) was acquired during the marriage, because the trial court treated the contractual claim which the LLC was pursuing against the United States Government as an asset of the husband, separate from the value of the marital interest in the LLC, the value of the

2. Lien.

Trial court erred in awarding a wife a lien to secure the wife's alimony in solido payment against various parcels of real property because the parcels were owned by limited liability companies which the husband owned and not by the husband, individually. Barton v. Barton, — S.W.3d —, 2020 Tenn. App. LEXIS 502 (Tenn. Ct. App. Nov. 10, 2020).

TITLE 49

EDUCATION

CHAPTER 2

LOCAL ADMINISTRATION

PART 1 GENERAL PROVISIONS

49-2-101. County legislative bodies — Powers and duties.

NOTES TO DECISIONS

5. Tax Levy by Counties.

Special school districts were irrelevant to the standing of counties to challenge the constitutionality of the Tennessee Education Savings Account Pilot Program because the counties had a number of vitally important responsibilities for local education agencies (LEAS); the

school tax for the LEAs in the counties was established by the respective county commissions, and the counties in which a special school district was located had virtually no responsibilities for them. Metro. Gov't of Nashville v. Tenn. Dep't of Educ., — S.W.3d —, 2020 Tenn. App. LEXIS 434 (Tenn. Ct. App. Sept. 29, 2020).

CHAPTER 5

PERSONNEL

PART 5 TEACHERS' TENURE

49-5-511. Dismissal or suspension of teachers — Causes for dismissal — Position reduction — Written notice — Preferred list for employment — Convictions — License revocation.

NOTES TO DECISIONS

19. Constructive Discharge.

In an action by a teacher for wrongful termination, the court concluded that the doctrine of constructive discharge was inconsistent with the Teacher Tenure Act, T.C.A. § 49-5-501 to 49-5-515, intended to give tenured teachers ample opportunity to be heard and ensure that

dismissal decisions are made methodically, with transparency, and by consensus of professional educators and thus, the teacher failed to state a claim for which relief may be granted. *Lemon v. Williamson Cty. Sch.*, — S.W.3d —, 2021 Tenn. LEXIS 2 (Tenn. Jan. 7, 2021).

CHAPTER 6

ELEMENTARY AND SECONDARY EDUCATION

PART 4 JUNIOR AND SENIOR HIGH SCHOOLS GENERALLY

49-6-410. "Secondary education" defined — Secondary school.

NOTES TO DECISIONS

1. What Constitutes "School".

Evidence was sufficient to convict defendant of the sale of 0.5 grams or more of cocaine and of the delivery of 0.5 grams or more of cocaine in a drug-free school zone because the school at issue was a secondary school as it provided an education normally available and required by

state standards to be taught to children enrolled in grades seven through 12; and it awarded graduates high school diplomas and allowed them to transfer credits earned for courses taken at the school. *State v. Smith*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 716 (Tenn. Crim. App. Nov. 12, 2020).

PART 26 TENNESSEE EDUCATION SAVINGS ACCOUNT PILOT PROGRAM

49-6-2601. Short title.

NOTES TO DECISIONS

ANALYSIS

1. Constitutionality.
2. Local Effect.
3. Standing.

1. Constitutionality.

For Tenn. Const. art. XI, § 9 to apply, the Education Savings Account Pilot Program (ESA Act) must be applicable to a particular county or municipality either in its government-

tal or proprietary capacity; given that the purpose of the constitution is to give local control over local legislation, and the ESA Act is local in effect and is applicable to Davidson and Shelby counties in their governmental capacities, whether the Act also affects or primarily affects private rights is irrelevant. *Metro. Gov't of Nashville v. Tenn. Dep't of Educ.*, — S.W.3d —, 2020 Tenn. App. LEXIS 434 (Tenn. Ct. App. Sept. 29, 2020).

2. Local Effect.

Because the Tennessee Education Savings Account Pilot Program, by its terms, was designed to operate exclusively in particular parts of the state, it is not a general law; consequently, it must be considered local in effect. *Metro. Gov't of Nashville v. Tenn. Dep't of*

Educ., — S.W.3d —, 2020 Tenn. App. LEXIS 434 (Tenn. Ct. App. Sept. 29, 2020).

3. Standing.

Special school districts were irrelevant to the standing of counties to challenge the constitutionality of the Tennessee Education Savings Account Pilot Program because the counties had a number of vitally important responsibilities for local education agencies (LEAs); the school tax for the LEAs in the counties was established by the respective county commissions, and the counties in which a special school district was located had virtually no responsibilities for them. *Metro. Gov't of Nashville v. Tenn. Dep't of Educ.*, — S.W.3d —, 2020 Tenn. App. LEXIS 434 (Tenn. Ct. App. Sept. 29, 2020).

49-6-2602. Part definitions.

NOTES TO DECISIONS

1. Standing.

Counties had standing to bring an action to challenge the constitutionality of the Tennessee Education Savings Account Pilot Program (ESA Act) because there were fiscal effects upon the budgets the counties had adopt that were

caused by the ESA Act; the size of the school budgets and the use of the reimbursement “replacement” funds were affected. *Metro. Gov't of Nashville v. Tenn. Dep't of Educ.*, — S.W.3d —, 2020 Tenn. App. LEXIS 434 (Tenn. Ct. App. Sept. 29, 2020).

49-6-2605. Funding calculations — School improvement fund — Allowable uses of ESA funds — Participating schools — Administration of program.

NOTES TO DECISIONS

ANALYSIS

- 1. Construction.
- 2. Standing.

1. Construction.

From the “to be used for school improvement” language in subsection(b)(2)(A), funds are not a replacement for the operational funds taken; the language “subject to appropriation” demonstrates that the funding is not guaranteed. *Metro. Gov't of Nashville v. Tenn. Dep't of Educ.*, — S.W.3d —, 2020 Tenn. App. LEXIS 434 (Tenn. Ct. App. Sept. 29, 2020).

2. Standing.

Counties had standing to bring an action to challenge the constitutionality of the Tennessee Education Savings Account Pilot Program (ESA Act) because there were fiscal effects upon the budgets the counties had adopt that were caused by the ESA Act; the size of the school budgets and the use of the reimbursement “replacement” funds were affected. *Metro. Gov't of Nashville v. Tenn. Dep't of Educ.*, — S.W.3d —, 2020 Tenn. App. LEXIS 434 (Tenn. Ct. App. Sept. 29, 2020).

TITLE 50
EMPLOYER AND EMPLOYEE
CHAPTER 1
EMPLOYMENT RELATIONSHIP AND PRACTICES

PART 3 WORKING CONDITIONS GENERALLY

**50-1-304. Discharge for refusal to participate in or remain silent about
illegal activities, or for legal use of agricultural product
— Damages — Frivolous lawsuits.**

NOTES TO DECISIONS

ANALYSIS

3. Elements.
11. Complaint Stated Cause of Action.
15. Attorney Fees.

3. Elements.

Appellant's Tennessee Public Participation Act claim failed as he did not allege that any activity he reported violated a civil or criminal code as required, plus he admitted being told that his refusal to sign a job performance plan was the reason for his termination, which was not an activity protected by the Act. *Parker v. ABC Techs., Inc.*, — S.W.3d —, 2021 Tenn. App. LEXIS 65 (Tenn. Ct. App. Feb. 25, 2021).

Appellant's Tennessee Public Participation Act claim failed as to appellees because he did not allege he was employed by either one of them. *Parker v. ABC Techs., Inc.*, — S.W.3d —, 2021 Tenn. App. LEXIS 65 (Tenn. Ct. App. Feb. 25, 2021).

11. Complaint Stated Cause of Action.

It was error to dismiss an employee's complaint under the Tennessee Public Protection

Act (TPPA), alleging the employee was terminated for refusing to remain silent about an employer's failure to enact workplace violence policies, because the employee alleged a violation of the Occupational Safety and Health Act's general duty clause which implicated important public policy concerns in Tennessee, which satisfied the TPPA's "illegal act" requirement. *Davis v. Vanderbilt Univ. Med. Ctr.*, — S.W.3d —, 2020 Tenn. App. LEXIS 349 (Tenn. Ct. App. Aug. 5, 2020).

15. Attorney Fees.

There was no dispute that under the statute, appellant was entitled to reasonable attorney fees incurred in prosecuting her action, but even assuming the trial court was permitted to determine the appropriate hourly rate in the locality in the absence of proof, the trial court failed to do so in a way that afforded meaningful appellate review; the trial court did not discuss the experience of counsel and did not say what it believed to be the proper market rate, and remand was required. *Smith v. All Nations Church of God*, — S.W.3d —, 2020 Tenn. App. LEXIS 535 (Tenn. Ct. App. Nov. 25, 2020).

PART 8 RETALIATORY DISCHARGE

50-1-801. Burden of proof in case of retaliatory discharge.

NOTES TO DECISIONS

1. Construction.

Appellee asserted one claim purportedly under the statute, but the court construed the claim as one for retaliatory discharge under

common law. *Parker v. ABC Techs., Inc.*, — S.W.3d —, 2021 Tenn. App. LEXIS 65 (Tenn. Ct. App. Feb. 25, 2021).

CHAPTER 3

OCCUPATIONAL SAFETY AND HEALTH ACT OF 1972

PART 1 GENERAL PROVISIONS

50-3-102. Purpose.

NOTES TO DECISIONS

2. Tennessee Public Protection Act.

It was error to dismiss an employee's complaint under the Tennessee Public Protection Act (TPPA), alleging the employee was terminated for refusing to remain silent about an employer's failure to enact workplace violence policies, because the employee alleged a viola-

tion of the Occupational Safety and Health Act's general duty clause which implicated important public policy concerns in Tennessee, which satisfied the TPPA's "illegal act" requirement. *Davis v. Vanderbilt Univ. Med. Ctr.*, — S.W.3d —, 2020 Tenn. App. LEXIS 349 (Tenn. Ct. App. Aug. 5, 2020).

CHAPTER 6

WORKERS' COMPENSATION LAW

PART 1 GENERAL PROVISIONS

50-6-102. Chapter definitions.

Workers' Compensation Appeals Board Decisions. An employee alleged suffering a low back injury while performing her work duties. Based on the authorized physician's opinion that the work incident aggravated the employee's pre-existing condition but that greater than 51% of the cause was related to the employee's degenerative pre-existing process, the employer denied the claim. The employee sought treatment from another physician whose responses to a questionnaire indicated the work incident more likely than not caused the employee's need for medical treatment. Following an evidentiary hearing, the trial court awarded medical benefits and ordered the employer to authorize further treatment with the physician sought out by the employee. The employer has appealed. On appeal, the board found that the employee presented sufficient medical proof to rebut the statutory presumption of correctness afforded the authorized physician's causation opinion. In contrast to the authorized physician's opinions, the second physician linked the employee's symptoms to the work incident and provided an opinion that the employment "more likely than not" caused her need for medical treatment. While the second physician's opinions may be insufficient to establish causation by a preponderance of the evidence at trial, those opinions, considered with the employee's lay testimony, were sufficient evidence to rebut the presumption of correctness accorded the authorized physician's causation opinion and to allow the trial

court to determine that the employee would likely prevail at a hearing on the merits. *Blevins v. Southern Champion Tray, LP*, 2019 TN Wrk Comp App Bd LEXIS 29

An employee alleged he suffered injuries when a large airplane tire rolled off a cart and struck him. In addition to physical injuries to his left shoulder and neck, the employee asserted he suffered depression due to his injuries and the loss of his job. He requested a panel of specialists after receiving a referral for a psychological evaluation from his authorized pain management physician. The employer declined to provide a panel of psychologists. The trial court ordered the employer to provide a panel of specialists in response to a pain management specialist's referral for psychological evaluation and treatment. An authorized physician had referred the employee to the pain management specialist, who provided authorized pain management treatment. The pain management specialist, an authorized physician, made a referral to a psychologist. That referral was presumed medically necessary for treatment of the employee and the employer offered no evidence that the employee did not suffer from symptoms of depression due to his loss of function. Moreover, the employer offered no expert medical testimony to refute the pain management specialist's opinion that the employee needed treatment for his depression. In conclusion, the evidence supported the trial court's order for a panel of specialists, but the order was modified to limit it to a panel of psycholo-

gists, as recommended by the pain management specialist. *Montgomery v. Mitchell Industrial Tire Co., Inc.*, 2019 TN Wrk Comp App Bd LEXIS 32.

Following a physical assault in the workplace, the employee initiated a claim for workers' compensation benefits for her alleged physical and mental injuries. The employer accepted the claim for the physical injuries but denied that the employee's alleged mental injury arose primarily out of the work incident. Following a trial, the court properly concluded the employee did not prove by a preponderance of the evidence that she developed a mental injury arising primarily out of and in the course and scope of her employment and denied benefits for the alleged mental injury. Neither the employee's testimony nor the medical proof established that the employee's mental symptoms following the work assault substantially differed from those she reported to her primary care physician eight months before the incident. Following the assault, the employee returned to work and for the next eight months she successfully endured the same general work stress that she experienced before her injury. Furthermore, the trial court had concluded the employee was terminated not because of her disability but rather a disagreement with her supervisor, which was not the reason the employee asserted in her resignation letter. *Holdway v. Lakeside Behavioral Health Systems*, 2019 TN Wrk Comp App Bd LEXIS 36.

The claimant is an artisan whose expertise is fabricating and sculpting artificial rocks for various types of exhibits. In this case, he was working at the Nashville Zoo and alleged he suffered a work-related injury. He contended the company that hired him to come to Nashville to perform the work was his employer and was responsible for providing workers' compensation benefits as a result of his injury. The alleged employer denied that it was responsible for providing benefits, asserting the claimant was an independent contractor. Following an expedited hearing, the trial court properly determined the claimant was an independent contractor and denied the requested benefits. The claimant was a resident of Florida who agreed to come to Nashville for the purpose of completing a single project that was known to be temporary work. The very nature of the working arrangement was that of a contractor (the artistic director of the project) and an independent contractor (the claimant, an artist tasked with effectuating a portion of the artistic vision of the Zoo). *Kent v. Delatorre Art Design, Inc.*, 2019 TN Wrk Comp App Bd LEXIS 48.

An employee, a nursing assistant, was helping a patient in a chair when the patient began to fall. As she reached to catch the patient, the employee felt pain in her left shoulder and neck. Four days later, she was involved in a

motor vehicle collision unrelated to her employment that resulted in pain in her leg, wrist, and elbow. The employer provided medical care but later took the position that the employee's medical conditions did not arise primarily from the work accident and that the motor vehicle accident constituted an intervening cause of the employee's conditions. Following a trial, the court properly found the employee suffered injuries arising primarily out of her employment and awarded temporary total disability benefits, permanent partial disability benefits, and future medical benefits. With respect to whether the employee's car accident was a subsequent intervening event that would break the chain of causation and relieve the employer of its obligation to provide benefits, there was insufficient proof to support a finding that either the car accident or the employee's work as a hairstylist advanced or aggravated her medical conditions. Although the medical records indicated the employee's work as a stylist may have increased her symptoms, there was no opinion in the record, expert or otherwise, that her injuries arose primarily out of either the motor vehicle accident or her work as a stylist. Rather, as the trial court concluded, the preponderance of the evidence supported the conclusion that the employee's left shoulder and neck injuries arose primarily out of and in the course and scope of her work with the employer. *Clay v. Signature Healthcare*, 2019 TN Wrk Comp App Bd LEXIS 58.

An employee alleged she injured her low back and/or aggravated a pre-existing arthritic condition in her right hip as a result of a work-related accident. Following a course of authorized treatment with two physicians, the employee asserted she was entitled to additional medical treatment. In response to the employer's motion for summary judgment, which was supported by the opinions of three physicians, the employee submitted the sworn declaration of a physician's assistant. The trial court properly granted the employer's motion for summary judgment and dismissed the employee's claim. The employer presented sufficient evidence that the employee's medical conditions and current need for treatment did not arise primarily from the work accident. As a result, the burden shifted to the employee to come forward with sufficient evidence showing a genuine issue of material fact as to the cause of her medical conditions and need for additional treatment. However, the sworn declaration of a physician's assistant, without more, cannot create a genuine issue of material fact as to the issue of causation. A physician's assistant, like a nurse practitioner, is not qualified to offer an expert opinion on medical causation. Moreover, the physician assistant couched her opinions in terms such as "may be reasonably referable" and "may be related." Such opinions, even if admissible, do not meet the standards to

satisfy causation. Thus, the employee did not come forward with sufficient evidence at the summary judgment stage to show a genuine issue of material fact as to the issue of medical causation. *Adiole v. Logan Senior Care, LLC*, 2019 TN Wrk Comp App Bd LEXIS 78.

An employee was involved in a motor vehicle accident while riding as a passenger in a work vehicle. He asserted he sustained injuries to both arms and his right shoulder as a result of that accident. After several medical evaluations, the authorized physician concluded that the employee's medical conditions pre-existed the work accident and were not at least fifty-one percent causally related to that accident. Following an expedited hearing, the trial court properly denied the employee's interlocutory request for additional medical and temporary disability benefits. The Board agreed with the trial court that the employee did not rebut the presumption of correctness attributable to the authorized physician's causation opinion and did not come forward with sufficient proof at the expedited hearing to show he is likely to prevail at trial on the issue of medical causation. *Dennis v. Memphis Light, Gas & Water*, 2019 TN Wrk Comp App Bd LEXIS 80.

An employee, a sales manager at an office supply store, alleged he suffered a right knee injury as a result of performing work activities over a two-day period. After timely reporting his injury, the employee sought medical care at a hospital emergency department and was referred to an orthopedic surgeon who subsequently diagnosed a tear in the employee's meniscus and recommended surgery. The employer denied the claim, contending the employee did not suffer a compensable accidental injury based upon the medical proof establishing that the employee suffered an acute injury rather than a gradual injury. In part, the trial court ordered the employer to provide medical benefits, including the recommended knee surgery. The employee identified specific physical activities he performed over the course of a narrow and identifiable period of time that resulted in his right knee injury. His co-worker corroborated his testimony as to the work the employee performed. The fact that the employee was unable to point to the specific moment in time that a tear occurred to his medial meniscus does not prevent his claim from being compensable. The employee successfully met his burden at the expedited hearing by identifying the time and place of his injury, a two-day period over which he performed specific physical tasks that his physician opined are consistent with the type of injury he sustained. *Friend v. Staples Contract and Commercial, LLC*, 2020 TN Wrk Comp App Bd LEXIS 12.

An employee reported back pain after lifting totes at work and sought medical benefits from her employer. After the employee was seen by an onsite nurse and a physician at an urgent

care facility, the employer declined to authorize a referral to an orthopedic specialist because the employee was unable to identify a specific date of injury, a specific incident, or a set of incidents allegedly causing her back condition. The employer also asserted the employee failed to provide proper notice of a work injury and failed to show her back condition arose primarily from a work accident. Following an expedited hearing, the trial court ordered the employer to provide the employee a panel of orthopedic specialists, and the employer has appealed. First, the employer asserted that the employee did not provide timely written notice of the injury and did not even provide timely verbal notice of an accident. However, the employee credibly testified that she reported ongoing back pain to an assistant manager, and received medical treatment from the employer's on-site clinic. Thus, the employer had actual notice of the employee's alleged injury. Moreover, it was undisputed the employer provided the employee a panel of physicians pursuant to the workers' compensation law, and she was treated by an authorized physician. The employer offered no proof that any alleged defective notice caused it prejudice. Second, the employee was likely to prevail at trial in proving a set of incidents sufficiently identifiable by time and place of occurrence, where the employee offered unrefuted testimony that her low back pain began while she was lifting heavy totes at work in September 2018, and she further testified, again without contradiction, that she reported her back pain to an assistant manager on multiple occasions and, ultimately, was seen by an on-site nurse and by a panel-selected physician at an urgent care facility. *Ibarra v. Amazon Fulfillment Services, Inc.*, 2020 TN Wrk Comp App Bd LEXIS 13.

An employee reported that his left knee gave way while he was climbing a ladder at work. The employee had suffered a work-related injury to his left knee several years before when his employer had workers' compensation coverage with a different insurer. The employee also had been diagnosed with pre-existing osteoarthritis in his left knee unrelated to his work injuries. One physician testified that the employee's current need for a total knee arthroplasty was caused primarily by his pre-existing osteoarthritis. Another physician opined that the most recent work accident caused an exacerbation of his pre-existing osteoarthritis. The trial court concluded the employee is likely to prevail at trial in proving the need for a total knee arthroplasty arose primarily from the most recent work accident, and it ordered the employer to authorize treatment, including any recommended surgery. The Board concluded that the trial court erred in concluding the employee's lay testimony and the opinions expressed by the employee's expert outweighed the unequivocal testimony of an orthopedic

surgeon with respect to the need for a total knee replacement surgery. The employee was entitled to reasonable and necessary medical treatment causally related to the work accident. However, the evidence presented at the expedited hearing did not support an order compelling the employer and its current insurer to authorize the total knee arthroplasty at this time. *Barnes v. Jack Cooper Transport Co.*, 2020 TN Wrk Comp App Bd LEXIS 16.

An employee sustained an injury to her right hand and right knee after tripping over a pallet in the course of her employment. The claim was accepted as compensable and the employer provided medical benefits, including authorization of a partial knee replacement. Following surgery, the employee began experiencing back and hip pain, prompting a referral for a neurosurgical evaluation that resulted in a recommendation for lumbar surgery. The employer authorized decompression surgery, but declined to authorize a fusion. The employee filed a petition seeking, in part, to compel the employer to authorize both procedures. The trial court ordered the employer to authorize the recommended surgery. On appeal, the employer that the trial court erred in awarding benefits to the employee when she failed to prove her back and hip injuries were the result of a specific incident or set of incidents that were identifiable by time and place of occurrence. It was undisputed that the employee suffered a compensable injury to her knee after tripping over a pallet at work. The employee's theory of recovery relied on the assertion that her back and hip complaints were the direct and natural consequence of the compensable knee injury and were not caused by a specific incident or set of incidents at work. Thus, the employee's inability to describe a specific incident or set of incidents identifiable by time and place of occurrence that resulted in her back and hip complaints was not a bar to relief. Moreover, the employer offered no proof to rebut a physician's opinion that the employee's knee injury and subsequent surgery caused an alteration in her gait that resulted in an aggravation of her preexisting hip condition and her lumbar condition. Accordingly, the evidence supported the trial court's determination that the employee was likely to prevail at trial in establishing the compensability of her lumbar and hip conditions. *Hudgins v. Global Personnel Solutions, Inc.*, 2020 TN Wrk Comp App Bd LEXIS 19.

An employee, an assistant store manager, alleged a bag of dog food fell on her at work, resulting in injuries to her neck and shoulder. Following an expedited hearing, the trial court determined that the opinion of an authorized treating physician was sufficient to establish that the employee would likely prevail on the merits and ordered the employer to provide a

panel of physiatrists for nonoperative treatment for her cervical strain as recommended by the authorized physician. The trial court additionally determined that the employee was entitled to 18 days of temporary disability benefits. The employer appealed. At an expedited hearing, an employee need not prove every element of a claim by a preponderance of the evidence to be entitled to temporary disability or medical benefits, but must instead present evidence sufficient for the trial court to conclude that the employee would likely prevail at a hearing on the merits. However, the employer did not assert that the evidence presented at the expedited hearing failed to support the trial court's determination that the employee is likely to prevail at trial, but essentially insisted the applicable standard of proof at the expedited hearing is not a lesser evidentiary standard. The Board was unpersuaded by the employer's argument and affirmed the trial court's determinations. *Gillum v. Dollar General Corporation*, 2020 TN Wrk Comp App Bd LEXIS 25.

An employee alleged injuries as a result of receiving an electrical shock in the course of her employment. After receiving treatment from an unauthorized dentist as well as from authorized medical care providers, the employee filed a petition alleging entitlement to additional benefits. She subsequently requested a hearing in which she sought to compel the employer to provide benefits for dental injuries she alleged she suffered as a result of the workplace incident. Following the hearing, the trial court denied benefits for the employee's alleged dental injuries but awarded other medical benefits. Thereafter, the employer filed a motion for summary judgment supported by statements of allegedly undisputed facts. In response, the employee submitted numerous documents, including a letter from a dentist stating that the dental work she needed "could very well be due to the electrical shock." The trial court granted the employer's motion for summary judgment in part and dismissed the employee's claims for injuries to her mouth, eyes, and hearing. The trial court denied the employer's motion as it related to the employee's claim of dental injuries. The employer has appealed. The trial court's grant of summary judgment dismissing the employee's alleged non-dental injuries was affirmed, but the trial court's denial of summary judgment as to the employee's alleged dental injuries was reversed. A dentist's opinion that the work that needed to be performed to save the employee's teeth "could very well be" the result of the electric shock was insufficient as a matter of law to support an award of benefits for the employee's alleged dental injuries. *Armstrong v. Chattanooga Billiard Club*, 2020 TN Wrk Comp App Bd LEXIS 40.

NOTES TO DECISIONS

ANALYSIS

1. Evidence Sufficiency.
2. Causation.

1. Evidence Sufficiency.

Evidence preponderated in favor of the trial court's holding that an employee did not suffer a new injury from incidents with other employers because the employee testified that, after each incident, her wrist pain eventually returned to her baseline level on its own; a doctor opined that he saw no significant change from the employee's condition before the incidents, and each incident resulted only in a temporary increase in pain. *Paris v. McKee Foods Corp.*, — S.W.3d —, 2021 Tenn. LEXIS 53 (Tenn. Feb. 18, 2021).

50-6-108. Right to compensation exclusive.

NOTES TO DECISIONS

1. Exclusivity.

Although the teacher alleged that the department of education intentionally failed to remedy the mold infestation after notice by knowingly permitting a hazardous work condition to exist on school grounds, the complaint was devoid of factual allegations that the department actually intended to injure him, as the department allowed him to relocate to the vocational shop, and thus the narrow exception to the Workers' Compensation Law's exclusivity provision was inapplicable in this case. *Upchurch v. Sullivan Cty. Dep't of Educ.*, — S.W.3d —, 2021 Tenn. App. LEXIS 118 (Tenn. Ct. App. Mar. 24, 2021).

Teacher alleged injuries that were causally connected to his exposure to toxic black mold while performing the duties for which the department of education employed him; there-

2. Causation.

Trial court erred in holding that the independent intervening cause principle relieved a former employer of liability under the settlement agreement with the employee and the workers' compensation statutes because there was no finding of a new injury or an aggravation of the wrist injury the employee had while working for the former employer. *Paris v. McKee Foods Corp.*, — S.W.3d —, 2021 Tenn. LEXIS 53 (Tenn. Feb. 18, 2021).

If the employee's activity results in only an increase in pain but there is no new injury or aggravation of the original injury, the independent intervening cause principle is not applicable to relieve the original employer of liability. *Paris v. McKee Foods Corp.*, — S.W.3d —, 2021 Tenn. LEXIS 53 (Tenn. Feb. 18, 2021).

fore, the Workers' Compensation Law provided the exclusive remedy for his injuries and precluded him from seeking compensation under tort law. *Upchurch v. Sullivan Cty. Dep't of Educ.*, — S.W.3d —, 2021 Tenn. App. LEXIS 118 (Tenn. Ct. App. Mar. 24, 2021).

Teacher alleged that the department of education intentionally and recklessly exposed him to toxic black mold and engaged in a smear campaign to scandalize his character; as this emotional distress arose out of and in the course of his employment with and dismissal from the department, dismissal of this tort claim was appropriate under the exclusive remedy provision of the Workers' Compensation Law. *Upchurch v. Sullivan Cty. Dep't of Educ.*, — S.W.3d —, 2021 Tenn. App. LEXIS 118 (Tenn. Ct. App. Mar. 24, 2021).

50-6-110. Injuries not covered — Drug and alcohol testing.

Workers' Compensation Appeals Board Decisions. An employee, a crew member of a tree and brush control company, suffered serious injuries when he was pulled into a wood chipper. The employer denied the claim, asserting the employee would not have been hurt unless he violated a safety rule. Following a trial, the court found the employee had sustained a compensable injury and the employer had not established the willful violation of a safety rule. The employer has appealed. In order to prevail on the affirmative defense of willful misconduct, an employer must establish the following: (1) the employee's actual, as opposed to constructive, notice of the rule; (2)

the employee's understanding of the danger involved in violating the rule; (3) the employer's bona fide enforcement of the rule; and (4) the employee's lack of a valid excuse for violating the rule. However, before this test becomes applicable, it must be shown there was an actual violation of a rule. The employer did not establish by the greater weight of the evidence the existence of a rule violation in the first place. The greater weight of the evidence did not point to the employee having committed misconduct or having violated a safety rule, much less that he did so willfully as required by statute. As a result, the trial court's finding that the employee's injuries are compensable

was affirmed. *Hardin v. W.A. Kendall & Co., Inc.*, 2019 TN Wrk Comp App Bd LEXIS 23.

An employee, a stagehand union worker responsible for erecting and tearing down spaces for conferences and trade shows, was injured when a cart fell over on him. He received some authorized medical care before the employer denied the claim on the basis of a positive drug screen. The employer also asserted the employee violated a known safety rule. With respect to the employer's intoxication defense, the trial court concluded that the employer presented insufficient proof of this affirmative defense. The employer asserted the trial court erred in reaching that conclusion, but it provided no evidence in support of its defense other than a positive drug screen. It offered no testimony from any witness that the employee appeared impaired on the date of the accident. It presented no expert medical opinion that the levels of THC or oxycodone reflected on the

drug screen would have caused impairment. In short, it offered no evidence that the employee's alleged illegal drug use was the proximate cause of his injuries. The trial court also concluded the employer had not come forward with evidence to satisfy the four elements of its willful misconduct defense based on the employee's alleged violation of its "push, don't pull" safety rule. The trial court reviewed the video evidence and did not conclude it showed the employee violating the employer's safety rule while attempting to manipulate the loaded cart. Moreover, it concluded there was scant evidence of the employer's bona fide enforcement of the "push, don't pull" rule. Again, the employer presented no meaningful argument as to how the trial court erred in its analysis of the willful misconduct defense. The trial court's decision was affirmed. *Woodard v. Freeman Expositions, LLC*, 2020 TN Wrk Comp App Bd LEXIS 15.

50-6-116. Construction of chapter.

Workers' Compensation Appeals Board Decisions. The trial court denied an employer's motion for summary judgment, concluding there were genuine issues of material fact concerning whether an employee gave proper notice of his alleged injury. The employer has appealed. The trial court did not err in denying

the employer's motion because the employee's testimony regarding his alleged conversation with a supervisor, which the employer had not denied, created a genuine issue of material fact as to whether the employee gave proper notice of a work injury. *Jones v. Columbus McKinnon Corp.*, 2019 TN Wrk Comp App Bd LEXIS 57.

PART 2 CLAIMS AND PAYMENT OF COMPENSATION

50-6-201. Notice of injury.

Workers' Compensation Appeals Board Decisions. An employee reported back pain after lifting totes at work and sought medical benefits from her employer. After the employee was seen by an on-site nurse and a physician at an urgent care facility, the employer declined to authorize a referral to an orthopedic specialist because the employee was unable to identify a specific date of injury, a specific incident, or a set of incidents allegedly causing her back condition. The employer also asserted the employee failed to provide proper notice of a work injury and failed to show her back condition arose primarily from a work accident. Following an expedited hearing, the trial court ordered the employer to provide the employee a panel of orthopedic specialists, and the employer has appealed. First, the employer asserted that the employee did not provide timely written notice of the injury and did not even provide timely verbal notice of an accident. However, the employee credibly testified that she reported ongoing back pain to an assistant

manager, and received medical treatment from the employer's on-site clinic. Thus, the employer had actual notice of the employee's alleged injury. Moreover, it was undisputed the employer provided the employee a panel of physicians pursuant to the workers' compensation law, and she was treated by an authorized physician. The employer offered no proof that any alleged defective notice caused it prejudice. Second, the employee was likely to prevail at trial in proving a set of incidents sufficiently identifiable by time and place of occurrence, where the employee offered unrefuted testimony that her low back pain began while she was lifting heavy totes at work in September 2018, and she further testified, again without contradiction, that she reported her back pain to an assistant manager on multiple occasions and, ultimately, was seen by an on-site nurse and by a panel-selected physician at an urgent care facility. *Ibarra v. Amazon Fulfillment Services, Inc.*, 2020 TN Wrk Comp App Bd LEXIS 13.

NOTES TO DECISIONS

4. Notice Sufficient.

Employee's worker's compensation claim was time-barred because a reasonably prudent person in the employee's position, knowing he had significant knee problems, which got worse over

years of employment, would not wait until nine months after having knee replacement surgery to take any action. *Memphis Light, Gas & Water Div. v. Nesbit*, — S.W.3d —, 2021 Tenn. LEXIS 68 (Tenn. Mar. 26, 2021).

50-6-203. Limitation of time, claims and actions.

Workers' Compensation Appeals Board Decisions. The trial court erred in denying an employer's motion for partial summary judgment. Following a physical assault upon an employee in the workplace, the employer voluntarily provided medical care to the employee for shoulder and back injuries. More than one year after the date the employer made its last payment for medical treatment for the injuries, the employee filed a petition requesting medical care for a mental injury she alleged arose out of the same workplace assault. Regardless of when the employee became aware that particular injuries diagnosed subsequent to an assault were causally related to the assault, she knew she had an injury from the time of the assault. Moreover, she believed she was suffering from mental conditions due to the incident and requested care for such conditions soon after the assault. Her psychologist diagnosed her with posttraumatic stress disorder the same month in which the assault occurred. Therefore, the employee's statute of limitations was not tolled as to her alleged mental injury and her November 20, 2017 petition was untimely. *Linsey v. Acadia Healthcare Company*, 2019 TN Wrk Comp App Bd LEXIS 17.

In a compensation appeal, the trial court concluded the employee's petition for benefits was untimely and granted the employer's motion for summary judgment. The employee appealed, arguing the trial court erred in concluding there were no genuine issues of material

fact regarding the timeliness of the petition for benefits. The trial court's order granting summary judgment was affirmed. It was undisputed that the employee's last authorized medical appointment was October 8, 2015, the last voluntary payment was issued either November 12, 2015 or November 12, 2016, and no further benefits were paid until January 2018. Therefore, unless the employee's attempt to file a petition on November 2, 2016 tolled the statute of limitations, the eventual filing of her petition in January 2018 was untimely. However, the employee's attempt to submit a petition for filing by attaching it to an email addressed to a Bureau ombudsman did not constitute a "filing" and did not toll the applicable statute of limitations. *Vickers v. Amazon*, 2019 TN Wrk Comp App Bd LEXIS 52.

An employee, a truck driver, alleged suffering work-related injuries to his wrists while working for the employer, a trucking company. The employee admitted giving notice of his alleged November 2016 work injuries in April 2017 and, further, admitted attending an unauthorized medical evaluation for his wrists in February 2017. His petition for benefits was filed in October 2018, which the employer claimed was more than one year after its last voluntary payment of benefits. The trial court properly granted the employer's motion for summary judgment and dismissed the case as untimely. *Judy v. Covenant Transport, Inc.*, 2019 TN Wrk Comp App Bd LEXIS 74.

NOTES TO DECISIONS

1. Claim Barred.

Statute of limitations barred the claimant's workers' compensation benefits claim as he filed his petition more than one year after he discovered his injury because the claimant's attorney received the doctor's opinion that the claimant had sustained a compensable injury

in September 2016; at that point, knowledge was imputed onto the claimant, and he then had until September 2017 at the latest to file a petition; and the claimant waited until October 9, 2017 to file the petition. *Pearson v. Memphis Light Gas & Water Div.*, — S.W.3d —, 2021 Tenn. LEXIS 59 (Tenn. Mar. 24, 2021).

50-6-204. Medical treatment, attendance and hospitalization — Release of medical records — Reports — Disputes — Reimbursement or payment of expenses — Burial expenses — Physical examinations — Pain management — Impairment ratings.

Workers' Compensation Appeals Board Decisions. An employee petitioned the trial court to compel the employer to authorize certain medical treatment as recommended by a treating physician. The employer, citing a utilization review denial, declined to authorize the treatment. Following an expedited hearing, the trial court issued an order compelling the employer to authorize the requested treatment. The employer has appealed. The board initially noted that there is a presumption that such treatment is medically necessary. Since the employer's utilization review report, the assistant medical director's letter agreeing with that report, and the medical director's affidavit were never properly introduced as evidence at the expedited hearing, the employee's acknowledgments regarding the utilization review denial and the assistant medical director's agreement with it, standing alone, did not rebut the presumption of medical necessity. The trial court's order compelling the employer to authorize the requested treatment was affirmed. *Bauknecht v. Five Star Quality Care, Inc.*, 2019 TN Wrk Comp App Bd LEXIS 21.

An employee, a picker at the employer's warehouse facility, injured his foot when a box fell on it while at work. He was provided a panel of physicians and was later referred to a specialist by the physician he chose from the panel. The employee did not attend his appointment with the specialist because he felt the location was too far from his home. Instead, he obtained unauthorized treatment from a different specialist and filed a petition seeking medical benefits in the form of a panel of specialists or authorization to treat with his own specialist. While a specialist's location 25 miles from the employee's home may have been inconvenient to the employee, the inconvenience was not sufficient to place the specialist outside the employee's community for the purpose of serving as his authorized physician. The statutory scheme contemplates direct referrals to specialists and provides employers the option of accepting the referral or, instead, providing a panel of specialists. The statutes are silent as to whether an employee can demand a second panel after the employer accepts the referral from the first panel physician. The referral statute also does not impose specific criteria on the treating physician's selection of a specialist. Here, the treating physician's rationale for referring the employee to the specialist and the employer's acceptance of the referral did not violate the statute. However, the trial court's

ordering a panel of specialists, based on what it referred to as the employer's violation of the "spirit" of the referral statute, rather than the actual statutory language itself, was inappropriate and not within its authority. In short, after an initial panel of physicians is offered and an authorized physician is selected, that physician has the discretion to make a referral to a specialist. If the employer does not want to accept that referral, it can offer the employee a panel of specialists. However, there is nothing in the statutes that compels an employer to offer a panel of specialists any time there is a direct referral. Stated differently, there is no authority that enables an employee to negate an employer's statutory ability to accept a direct referral by insisting on a panel of specialists in every case. *Rhodes v. Amazon.com, LLC*, 2019 TN Wrk Comp App Bd LEXIS 24.

An employee alleged he suffered injuries when a large airplane tire rolled off a cart and struck him. In addition to physical injuries to his left shoulder and neck, the employee asserted he suffered depression due to his injuries and the loss of his job. He requested a panel of specialists after receiving a referral for a psychological evaluation from his authorized pain management physician. The employer declined to provide a panel of psychologists. The trial court ordered the employer to provide a panel of specialists in response to a pain management specialist's referral for psychological evaluation and treatment. An authorized physician had referred the employee to the pain management specialist, who provided authorized pain management treatment. The pain management specialist, an authorized physician, made a referral to a psychologist. That referral was presumed medically necessary for treatment of the employee and the employer offered no evidence that the employee did not suffer from symptoms of depression due to his loss of function. Moreover, the employer offered no expert medical testimony to refute the pain management specialist's opinion that the employee needed treatment for his depression. In conclusion, the evidence supported the trial court's order for a panel of specialists, but the order was modified to limit it to a panel of psychologists, as recommended by the pain management specialist. *Montgomery v. Mitchell Industrial Tire Co., Inc.*, 2019 TN Wrk Comp App Bd LEXIS 32.

An employee alleged he sustained head and neck injuries in the course and scope of his work handling livestock. He received autho-

rized medical treatment and was ultimately referred to a neurologist who provided an opinion in a deposition as to the degree of permanent impairment the employee sustained as a result of the work accident. The employer filed a motion to exclude portions of the doctor's testimony concerning the employee's permanent impairment rating, asserting the testimony did not comply with the requirements of Rules 702 and 703 of the Tennessee Rules of Evidence. The trial court properly concluded the doctor's opinions were admissible and denied the employer's motion. Considering the totality of the doctor's testimony, the preponderance of the evidence supported the trial court's determination that she applied the methodology contemplated by the AMA Guides and that her inability to recollect the details of her impairment assessments for the employee's alleged traumatic brain injury and cervical injury during her deposition did not indicate such a lack of trustworthiness as to render her opinions inadmissible. *Ailshie v. TN Farm Bureau Federation*, 2019 TN Wrk Comp App Bd LEXIS 55.

An employer filed a motion to compel the employee to submit to an examination by the employer's physician. The employee agreed to the requested examination, but asserted that his statutory right to have his own physician present permitted his physician's observing the examination via videoconference. The trial court properly granted the employer's motion to compel the employee to attend the examination but determined the statute giving the employee the right to have his own physician present contemplated only the physician's physical presence at the examination. The statute does not contemplate allowing an employee's physician to be "present" at an employer's examination via videoconference. *Williams v. CoreCivic*, 2019 TN Wrk Comp App Bd LEXIS 56.

An employer asserted the trial court erred, in part, in conditioning a medical examination requested by the employer on its being live-streamed to or video-conferenced with the employee's personal physician. There are no statutes, rules, or regulations providing for the video-conferencing of a medical examination. There are no rules or regulations explaining the manner in which such video-conferencing would be arranged, conducted, or secured. There are no rules or regulations governing who bears the expense of arranging and conducting such a video-conference. Consequently, with no statutes, rules, or regulations in place governing this practice, the board declined to create a "right" to insist on the video-conferencing or live-streaming of a medical examination. The creation of such a right, if deemed appropriate, is a function historically reserved for the legislature. *Caldwell v. Federal Mogul Motorsports Corp.*, 2019 TN Wrk Comp App Bd LEXIS 59.

After an employee experienced a work-related injury and underwent surgery, the parties reached a court-approved settlement of the employee's claim that identified the physician who was to provide future medical care. The employee subsequently requested additional medical care, but the designated physician, as well as multiple other physicians, refused to see her, indicating no additional medical care was necessary. Following a hearing to address the employee's request for additional medical care, the trial court denied the request, concluding the employee failed to establish she was in need of additional medical treatment for her work-related injuries. The employee filed a notice of appeal but failed to identify any issues for our review, failed to file a transcript of the hearing or a joint statement of the evidence, and failed to file a brief supporting her appeal. The Board affirmed the trial court's order denying the employee's request for additional medical treatment and certified the order as final. *Tate v. BWay Corporation*, 2019 TN Wrk Comp App Bd LEXIS 81.

An employee sustained injuries after being struck on the head by a metal bar while loading a trailer in the course of his employment. The claim was accepted as compensable. On appeal, the employee asserted that the trial court erred in denying his request for medical transportation services. The trial court concluded that the employee was not entitled to those services because he failed to show they were reasonably necessary as a result of his work-related injury. It did, however, determine that the employee was entitled to reimbursement of reasonable travel expenses. The employee argued that he was restricted from driving by a medical provider, was wheelchair bound, and had no one that was willing or able to constantly take off work to drive him. However, the employee provided nothing beyond his own statements to support his assertion that he was unable to drive or is restricted from driving as a result of his work injury. Nothing in the record supported a finding that medical transportation services were reasonably necessary as a result of the employee's work injury. The employee's unsworn emails and statements to that effect were not evidence. There was no merit in the employee's assertion that he was entitled to medical transportation services. *Washington v. UPS Ground Freight, Inc.*, 2020 TN Wrk Comp App Bd LEXIS 14.

An employee alleged she suffered an aggravation of a preexisting mental condition as a result of medication she was taking to treat a compensable work-related physical injury. The employer denied that a compensable aggravation occurred and refused to authorize a referral to a psychiatrist made by the employee's authorized physician. The trial court, in part, ordered the employer to authorize the psychiatrist referral. On appeal, the employer disputed

the employee's assertion that she suffered a new work-related mental injury or aggravation of a pre-existing mental condition. The employer did not dispute that the employee suffered from the symptoms she alleged, but it contended her condition was pre-existing and was caused by events in her personal life rather than the medication prescribed for her work-related injury. In contrast, the employee maintained that her underlying mental condition was aggravated by her use of Lyrica, resulting in a compensable aggravation of her pre-existing condition. An authorized physician referred the employee for a psychiatric evaluation that he believed was necessary as a result of the employee's Lyrica use. Thus, the burden of proof was on the employer to show that the referral was not medically appropriate as a result of the compensable physical injury. However, the employer offered no opinion other than its own that the need for the psychiatric referral was unrelated to the employee's work. The employer's interpretation of the employee's prior treatment records and its belief regarding the cause of her current mental complaints, absent supporting expert medical proof, were not sufficient to overcome the trial court's determination of the appropriateness of the referral for psychiatric evaluation and treatment. *Mollica v. EHHI Holdings, Inc.*, 2020 TN Wrk Comp App Bd LEXIS 22.

An employee sustained a work-related injury to her right ring finger and developed complications in her hand. She was subsequently diagnosed with complex regional pain syndrome in her right upper extremity. After she reached maximum medical improvement, her authorized treating physician assigned a permanent medical impairment rating. The employer then retained a physician to review medical records and express an opinion regarding the employee's permanent medical impairment. Because the opinions of the two rating physicians differed, the employer requested an impairment evaluation through the Bureau of Workers' Compensation's Medical Impairment Rating Registry ("MIRR"). The employee moved to quash the employer's request for an MIRR evaluation, contending that a medical records review was an insufficient basis to support the existence of a dispute concerning the medical impairment rating. The trial court denied the employee's motion and the employee appealed. We affirm the trial court's order and remand the case. The Board affirmed the trial court's order, concluding the trial court did not err in analyzing the issue. Nothing in the statute or regulations prevented either party from obtaining a second opinion on the issue of permanent medical impairment. Likewise, nothing in the statute or regulations prohibited either party from seeking that opinion based on a review of medical records. Either party can then seek an MIRR evaluation if a dispute as to the degree of

permanent medical impairment exists. *Gray v. Conagra Foods Packaged Foods Co., Inc.*, 2020 TN Wrk Comp App Bd LEXIS 24.

An employee alleged she suffered injuries as a result of physical altercations occurring at work. Following the initial expedited hearing, the employer was ordered to provide psychiatric treatment recommended by the authorized physician and to pay additional temporary disability benefits. That order was appealed, and we affirmed. After the employer provided a panel of psychiatrists whose practices were not located in the employee's community of residence, the employee declined to choose a physician from the panel and requested that the court order the employer to either provide a panel of psychiatrists within her community or appoint as the authorized provider the psychiatrist the employee had retained to provide an evaluation. Following a hearing, the trial court concluded the panel offered by the employer was invalid and mandated that the employer authorize the psychiatrist selected by the employee as the treating psychiatrist. considered. According to the employer, since it was undisputed that the psychiatrist was not an authorized treating physician, "the inquiry as to the trial court's error should end here per the requirements of TCA § 50-6-204(h). The trial court did not address these requirements in its order. In general, the Board refrains from addressing the applicability or effect of a statute relied upon by a party in the trial court in circumstances where the trial court has not first addressed the issue. Thus, the Board vacated the trial court's designation of the psychiatrist as the authorized treating psychiatrist and remanded the case for the trial court to address the applicability and impact, if any, of TCA § 50-6-204(h) on the court's analysis of these issues. *Gautreaux v. Hermitage Hall*, 2020 TN Wrk Comp App Bd LEXIS 44.

Following a court-approved settlement of an employee's claim for workers' compensation benefits, the employee sought additional medical treatment for lumbar complaints that he contended should be provided as a result of the settlement agreement. The employer declined to authorize the treatment, and the employee filed a petition for benefits seeking additional medical care. Following a hearing, the trial court concluded that the parties' settlement agreement did not exclude future medical care for any of the employee's work injuries and ordered the employer to provide future medical treatment for the employee's low back complaints. The employer appealed. TCA § 50-6-240(d) mandates that settlement agreements "compromising and settling the issue of future medical benefits" include a provision confirming that the employee has been informed of the potential consequences of the settlement, if any, with respect to Medicare and TennCare benefits and liabilities. Here, the parties' settle-

ment agreement did not include such a provision, and neither the parties nor the trial court addressed the applicability of this statutory language to the parties' settlement agreement. Thus, the trial court's order was vacated and the case was remanded for the trial court's

consideration of the applicability of TCA § 50-6-240(d) to the parties' settlement agreement and the impact on this case, if any, of the absence of the statutory language from that agreement. *Lane v. Securedemdy, Inc.*, 2020 TN Wrk Comp App Bd LEXIS 48.

NOTES TO DECISIONS

3. Causation.

Trial court erred in holding that the independent intervening cause principle relieved a former employer of liability under the settlement agreement with the employee and the workers' compensation statutes because there was no finding of a new injury or an aggravation of the wrist injury the employee had while working for the former employer; thus, the employee was entitled to statutory medical benefits, attorney fees, and costs. *Paris v. McKee Foods Corp.*, — S.W.3d —, 2021 Tenn. LEXIS 53 (Tenn. Feb. 18, 2021).

Employee was entitled to statutory medical benefits, attorney fees, and costs because the

evidence preponderated in favor of the trial court's holding that an employee did not suffer a new injury from incidents with other employers; the employee testified that, after each incident, her wrist pain eventually returned to her baseline level on its own, and a doctor opined that he saw no significant change from the employee's condition before the incidents and that each incident resulted only in a temporary increase in pain. *Paris v. McKee Foods Corp.*, — S.W.3d —, 2021 Tenn. LEXIS 53 (Tenn. Feb. 18, 2021).

50-6-205. Period of compensation — Maximum amount — Notice of payment, change or nonpayment — Records — Notice of controversy.

Workers' Compensation Appeals Board Decisions. The employee, a delivery driver, alleged he developed hernias while lifting a pallet of materials being delivered to a customer. He received authorized medical treatment, was assigned work restrictions, and later claimed the employer had wrongfully delayed payment of temporary partial disability benefits, entitling him to a twenty-five percent penalty. The employer responded that the penalty requested by the employee was not available for temporary partial disability benefits. Disagreeing with cases decided by the Tennessee Supreme Court's Special Workers' Compensation Appeals Panel, the trial court found that

the employee was entitled to the requested penalty. The Special Workers' Compensation Appeals Panel has stated that the statutory provision imposes a penalty of 25 percent on unpaid temporary total benefits only. The trial court authority exceeded its authority by declining to follow the reasoning of decisions of the Appeals Panel. Accordingly, the trial court's order imposing a penalty was vacated and the case was remanded for the court to consider the employee's request for a penalty anew in light of the applicable case law. *Lowder v. XPO Logistics Freight, Inc.*, 2019 TN Wrk Comp App Bd LEXIS 50.

50-6-207. Schedule of compensation.

Workers' Compensation Appeals Board Decisions. An employee suffered injuries to his left ankle, left knee, and back when a large metal entry gate he was opening at the employer's premises fell on him. The trial court awarded the employee permanent total disability benefits, and the employer has appealed. In particular, the employer argued that: (1) the employee failed to attempt to obtain any employment within his physical restrictions; (2) the employer's vocational expert located multiple jobs within the employee's permanent restrictions; (3) no physician opined that the employee was unable to physically perform any job; and (4) the employee was never prescribed

use of a cane. In reaching its decision that the employee is permanently totally disabled as a result of his workplace injury and in awarding him permanent total disability benefits, the trial court properly analyzed the factors. It observed that the employee is unable to sit or stand for long periods of time, noted that he uses a cane to walk, and that he takes medication that affects his cognitive functioning. The court also noted that although the employee has an associate's degree in criminal justice, he worked in the field for only one year as a prison guard, so he has no managerial experience in criminal justice, adding that the employee's physical limitations would prevent him from

performing law enforcement or security work. Likewise, the trial court concluded the employee's physical limitations prevented him from returning to the type of work he performed before his workplace injuries. Moreover, it noted that the employee's age and constant pain would hamper his ability to be retrained. The preponderance of the evidence supported these findings of the trial court. *Stocklin v. Barrett Distribution Centers, Inc.*, 2019 TN Wrk Comp App Bd LEXIS 22.

Following an employee's work-related back injury, the parties entered into a settlement agreement that resolved the employee's claim for permanent partial disability benefits and allowed the employee to petition for additional disability benefits once his original compensation period expired. At the conclusion of the initial compensation period, the employee sought increased benefits, asserting that, although he had returned to work for another employer, the wages or salary he was receiving was less than the wages or salary he received from his employer on the date of his injury and was less than 70% of his pre-injury average weekly wage or salary. The employer filed a motion for summary judgment, asserting there were no disputed material facts concerning whether the employee's wages with his new employer were greater than the wages he was receiving at the time of his injury. The trial court denied the employer's motion, concluding a genuine issue of material fact precluded summary judgment. The denial of the motion was affirmed because there was both contradictory and conflicting testimony regarding whether the employee was paid a salary or was paid an hourly rate for his work with the new employer. *Good v. Vickers Concrete Reinforcing, Inc.*, 2019 TN Wrk Comp App Bd LEXIS 26.

An employee, a mechanic, alleged suffering work-related injuries to his back while replacing a belt on a conveyor. The claim was accepted as compensable, and the employer provided workers' compensation benefits. The parties settled the case prior to the expiration of the original compensation period, leaving open the employee's right to seek increased or extraordinary benefits. At the end of his initial benefit period, the employee filed a petition seeking increased and/or extraordinary benefits. The employer filed a motion for summary judgment alleging the employee was unable to show by clear and convincing evidence that

limiting his benefits to the original award would be inequitable. The trial court denied the motion, concluding the employer did not negate an essential element of the employee's claim or show that the evidence was insufficient to prove an essential element of his claim. The trial court correctly denied the motion. The parties disputed the extent of the employee's vocational disability and presented competing theories on how the trial court should resolve the issue. The trial court was thus faced with different means of analyzing the issue of the employee's vocational disability, an issue that is, ultimately, a determination of fact. As the trial court observed, an employee's failure to make any effort to return to work is but one factor to consider when determining whether Employee is entitled to extraordinary benefits. *Warren v. The Pictsweet Co.*, 2019 TN Wrk Comp App Bd LEXIS 60.

An employee suffered physical and mental injuries during the course and scope of her work as a result of being robbed at gunpoint at the employer's store. The parties stipulated that the employee sustained 15% permanent impairment as a result of her injuries. Following a trial, the court awarded the employee permanent disability benefits and determined the employee was entitled to increased benefits. The court further determined the case was extraordinary and awarded the employee additional benefits for a total of 275 weeks of permanent disability benefits. The employer contended that the trial court erred in awarding increased permanent disability benefits because the employee's lack of reasonable effort in trying to return to work disqualified her from increased benefits. By including the phrase "[i]f appropriate" in authorizing a trial court to award increased benefits, the legislature expressed its intent that a trial court consider all relevant factors, including the circumstances of an injured worker's ability and/or willingness to return to work in a disabled state and the reasonableness of the employer in attempting to return the injured employee to work. Giving deference to the factual findings made by the trial court and based on the court's opportunity to hear the employee's testimony, the board held that the trial court did not err in determining it was appropriate to award the employee increased permanent disability benefits due to her post-traumatic stress disorder. *Wright v. Tennessee CVS Pharmacy, LLC*, 2019 TN Wrk Comp App Bd LEXIS 72.

NOTES TO DECISIONS

ANALYSIS

1. Permanent Total Disability.
2. —Disability Assessment.
5. Social Security Offset.

1. Permanent Total Disability.

Evidence did not preponderate against the determination that an employee was permanently and totally disabled because the trial court analyzed the trial testimony and medical

evidence as it related to the employee's injuries, skills, training, education, age, and vocational opportunities and accredited the trial testimony of the employee and a doctor; the employer did not present a witness to counter the doctor's testimony that the employee met the criteria for sedentary work. *Hopper v. UGN, Inc.*, — S.W.3d —, 2021 Tenn. LEXIS 67 (Tenn. Mar. 26, 2021).

2. —Disability Assessment.

Trial court did not err by finding that an employee, who was a firefighter that injured a shoulder in a training session, was not permanently and totally disabled because the employee presented no proof of the employee's vocational disability other than the employee's own statements and those of the employee's

family that the employee could not work, the employee's psychiatrist suspected symptom magnification, and the court found that the employee was not credible as the employee was able to drive a car despite uncontrollable flailing. *Vaughn v. City of Murfreesboro*, — S.W.3d —, 2020 Tenn. LEXIS 415 (Tenn. July 24, 2020).

5. Social Security Offset.

Because the evidence did not preponderate against the trial court's finding that the employee suffered an injury to the body, it followed that the trial court properly applied the social security offset under T.C.A. § 50-6-207(4)(A)(i). *Cummings v. Express Courier Int'l, Inc.*, — S.W.3d —, 2021 Tenn. LEXIS 55 (Tenn. Feb. 19, 2021).

50-6-210. Dependents — Compensation payments.

Workers' Compensation Appeals Board Decisions. After filing a petition for benefits identifying the deceased worker and the existence of a dependent spouse, the attorney of record took no further action on the claim. An individual identified as the decedent's niece later participated in a show cause hearing and requested additional time to file a request for a hearing. That request was granted, and the niece filed a request for an expedited hearing. The employer responded by filing a motion to dismiss, asserting that the niece is not a member of any class of potential dependents, that the niece is not the legal representative of the decedent's estate, and that she has no standing to bring a claim for death benefits. The trial court denied the employer's motion to dismiss, determining the motion should be treated as a motion for summary judgment because the employer relied on the niece's affidavit that was filed in support of the request for an expedited hearing. The employer has appealed. In the context of the appeal as presented, however, the

Board was unable to reach the merits of the issues because: (1) the attorney filing the petition for benefits failed to file a motion to withdraw and; (2) neither the parties nor the court addressed how or why the niece was added as a party. There was no motion to withdraw as counsel, no motion to substitute parties or add a party, and no order explaining the addition of the niece as a party or a judicially-appointed representative of the estate of the decedent. In addition, a non-party who is not an attorney may not represent an injured worker, a surviving spouse, or any other litigant in a workers' compensation case. Filings made by a person purportedly representing the estate of a deceased worker in a pro se capacity cannot be considered until the court has approved the withdrawal of the attorney of record and added the judicially-designated representative of the estate as a party. Accordingly, the trial court's order denying the employer's motion to dismiss is vacated. *Ayers v. Smith & Nephew, Inc.*, 2020 TN Wrk Comp App Bd LEXIS 38.

50-6-212. Hernia or rupture.

Workers' Compensation Appeals Board Decisions. An employee, an appliance delivery driver, alleged that he sustained a hernia when he and a co-worker lifted a cooking range onto the back of a truck. The trial court did not err in determining that the employee did not present sufficient evidence to establish he suffered a compensable hernia. Although there was no

dispute that the employee experienced symptoms following the lifting incident, he suffered ventral hernias and three surgeries were required to repair the hernias, the medical proof failed to establish that the hernia did not exist prior to the lifting incident. *Sustersic v. Lowe's Home Center, Inc.*, 2019 TN Wrk Comp App Bd LEXIS 18.

50-6-225. Appeal if dissatisfied or aggrieved by judgment.**NOTES TO DECISIONS****1. Review.**

Evidence preponderated in favor of the trial court's holding that an employee did not suffer a new injury from incidents with other employers because the employee testified that, after each incident, her wrist pain eventually returned to her baseline level on its own; a doctor opined that he saw no significant change from the employee's condition before the incidents, and each incident resulted only in a temporary increase in pain. *Paris v. McKee Foods Corp.*, — S.W.3d —, 2021 Tenn. LEXIS 53 (Tenn. Feb. 18, 2021).

Evidence did not preponderate against the determination that an employee was permanently and totally disabled because the trial court analyzed the trial testimony and medical evidence as it related to the employee's injuries, skills, training, education, age, and vocational opportunities and accredited the trial testimony of the employee and a doctor; the employer did not present a witness to counter the doctor's testimony that the employee met the criteria for sedentary work. *Hopper v. UGN, Inc.*, — S.W.3d —, 2021 Tenn. LEXIS 67 (Tenn. Mar. 26, 2021).

50-6-226. Fees of attorneys and physicians, and hospital charges. [Effective until July 1, 2021. See the version effective on July 1, 2021.]

Workers' Compensation Appeals Board Decisions. The trial court abused its discretion in ordering an employer to pay an employee's attorney's fees at an interlocutory stage of the case based on the employer's purported

wrongful denial of the claim and/or its erroneous failure to timely initiate workers' compensation benefits. *Travis v. Carter Express, Inc.*, 2019 TN Wrk Comp App Bd LEXIS 25.

50-6-226. Fees of attorneys and physicians, and hospital charges. [Effective on July 1, 2021. See the version effective until July 1, 2021.]

Workers' Compensation Appeals Board Decisions. The trial court abused its discretion in ordering an employer to pay an employee's attorney's fees at an interlocutory stage of the case based on the employer's purported

wrongful denial of the claim and/or its erroneous failure to timely initiate workers' compensation benefits. *Travis v. Carter Express, Inc.*, 2019 TN Wrk Comp App Bd LEXIS 25.

50-6-235. Depositions by physicians — Written medical report — Admissibility — Schedule for charges.

Workers' Compensation Appeals Board Decisions. An employee, a lineman, was injured when a pole fell from a trailer and struck him on the back, causing him to fall and hit his head. The employer provided medical treatment for the employee's back injury but denied that his complaints of headaches were causally related to the work accident. The employer filed an objection to the use of a doctor's Standard Form Medical Report (C-32) in lieu of a deposition. The trial court admitted the C-32 over the objection of the employer. On appeal, the employer argued that the employee gave inadequate notice of his intent to use the C-32, that the C-32 was deficient because it failed to include all the required information, and that the court failed to make findings establishing good cause for excusing the employee's failure to file medical records prior to the hearing. First, the employee's indication on his request

for expedited hearing that the doctor would appear "via C-32" was sufficient to put the employer on notice that the employee intended to rely on the document. Second, other than asserting that it did not receive adequate notice of the employee's intent to use the C-32 at the expedited hearing, the employer did not raise any issue in the trial court concerning whether the C-32 met the statutory requirements. Such issues were therefore waived. Third, while it is true that the employee failed to file any documentation other than his own affidavit to support his claim, the employer elected to file the employee's medical records. Thus, the record contained the employee's treatment records and a doctor's report and C-32, and these records provided an adequate basis for the trial court's decision. *Smith v. Galloway Construction, LLC*, 2019 TN Wrk Comp App Bd LEXIS 70.

50-6-237. Court of workers' compensation claims.

Workers' Compensation Appeals Board Decisions. An employee filed a petition alleging she suffered a mental injury as a result of work-related events in which she experienced unusual traumatic stimuli while working as a forensics technician for the employer. The employer filed a motion for summary judgment, asserting that, even if a mental injury occurred, the employee failed to file her claim within the applicable statute of limitations. The employee responded by asserting that the statute of limitations was tolled, when she discovered her mental condition was causally related to her employment, or, alternatively, that her mental injury is a gradual injury to which the "last day worked" rule applies. At a hearing addressing the employer's motion, the parties agreed that the specific incidents the employee alleged to have precipitated her mental injury occurred in 2011 or earlier, prompting the trial court to question whether it had jurisdiction over the case. However, the court declined to rule on the jurisdiction issue, focusing instead on whether a genuine issue of material fact existed that precluded summary judgment. The trial court denied the employer's motion, concluding there was a disputed factual issue concerning when the employee knew or should have known that she suffered an injury. The employer has appealed. The trial court erred in ruling on the

summary judgment motion prior to determining whether the court had subject matter jurisdiction. Thus, the trial court's order denying employer's summary judgment motion was vacated, and the case was remanded for the trial court to determine whether subject matter jurisdiction exists. *Nickerson v. Knox County Government*, 2020 TN Wrk Comp App Bd LEXIS 18.

An employee asserted he had numerous medical conditions caused by workplace exposures to asbestos, lead, and other toxins over a twenty-nine year employment period. The employer denied the claim, asserting there was no proof that occupational exposures to any toxins were the primary cause of any of the employee's alleged medical conditions. The dispute certification notice also identified as disputed issues jurisdiction, lack of proper notice, and the expiration of the statute of limitations. The employer asserted the employee had retired in June 2014. Following an expedited hearing, the trial court concluded the employee was not likely to prevail at trial on the issue of medical causation and denied the employee's claim for medical benefits. The employee appealed. The trial court's order was vacated because the trial court should have addressed subject matter jurisdiction as a threshold issue. *Wright v. Memphis Light, Gas & Water*, 2020 TN Wrk Comp App Bd LEXIS 20.

50-6-239. Request of hearing after issuance of dispute certification notice — Issuance of notice — Permission required to present issues not certified by mediator — Conduct of hearings — Hearings of disputes on expedited basis — Discovery disputes — Penalties for failure to comply with orders — Filing fees — Judicial review of orders.

Workers' Compensation Appeals Board Decisions. An employee worked for an employer loading and unloading trucks and scanning packages. He alleged suffering gradual injuries to his left knee, right ankle, and right shoulder as a result of his work. The employer denied the claim. After two expedited hearings, the trial court found the employee was unlikely to prevail at trial. The employee has appealed. The employee submitted no medical proof that his right shoulder complaints, caused a new injury, or caused an aggravation of a pre-existing condition. Likewise, he submitted no medical proof that his ankle complaints were in any way connected to his employment. Regarding the employee's left knee complaints, the employee had a degenerative condition in his left knee, and there was no medical evidence linking his condition to his employment. In short, the evidence does not preponderate against the trial court's conclusion that the employee is

unlikely to prevail at trial in establishing his entitlement to workers' compensation benefits. *Quarles v. FedEx Ground Package System, Inc.*, 2019 TN Wrk Comp App Bd LEXIS 19.

An employee, a package delivery driver, alleged that repeatedly climbing in and out of his work vehicle caused a gradual injury to his left knee, which he claimed aggravated a pre-existing knee condition and necessitated joint replacement surgery. The employee previously had a work-related injury to his left knee that resulted in a settlement. The employer denied that the need for knee replacement surgery arose primarily from a new injury but instead asserted the surgery should be covered by the medical provisions of the employee's prior settlement. Following a trial, the court properly concluded the employee suffered a new and distinct gradual injury that aggravated his pre-existing condition and primarily caused the need for knee replacement surgery, and

awarded medical benefits, permanent disability benefits, and certain discretionary costs. *Gilbert v. United Parcel Service, Inc.*, 2019 TN Wrk Comp App Bd LEXIS 20.

An employee, a home health aide, sustained work-related injuries when she caught a patient who was falling. She alleged the incident resulted in shoulder and low back injuries and aggravated a pre-existing cervical condition. The employer accepted the shoulder and low back injuries as compensable but denied that any aggravation of the employee's pre-existing cervical condition arose primarily out of the work incident. At a second expedited hearing, the trial court properly granted the employee's request for treatment for her cervical condition, determining she would likely prevail at trial in establishing an aggravation of her pre-existing condition. The entirety of a doctor's testimony, considered in conjunction with the employee's testimony concerning her history and the effect of her injuries on her activities and abilities, supported the trial court's conclusion that the employee is likely to prevail at trial in establishing the compensability of her cervical injury. *Owens v. Sitters*, 2019 TN Wrk Comp App Bd LEXIS 27.

Employees asserted that they are entitled to Tennessee workers' compensation benefits. The employer argued the employees elected to pursue benefits in another state and cannot now seek Tennessee benefits pursuant to Tennessee's election of remedies doctrine. In response, the employees contended the employer is estopped from claiming a binding election of remedies because it initiated and paid benefits under Tennessee law before any documents were filed in another state seeking benefits there. Following an evidentiary hearing, the trial court properly denied the employees' request for Tennessee benefits, concluding the employees knowingly and willingly pursued benefits in another state and are not likely to succeed in establishing an entitlement to Tennessee benefits. *Girardeau v. Danny Herman Trucking, Inc., LP*, 2019 TN Wrk Comp App Bd LEXIS 30.

An employee alleged suffering a repetitive injury to his left hand working in his employer's warehouse. The employer provided workers' compensation benefits, including a panel of physicians and authorized medical treatment. The authorized physician placed the employee at maximum medical improvement and opined he did not retain any permanent impairment from his work injury. The employer denied further benefits, and the authorized physician declined to see the employee again, prompting him to seek treatment on his own. The trial court properly found that, regardless of whether the employee sustained any permanent impairment, he was entitled to medical care for his injury. Because the authorized physician refused to see the employee, the

employee acted reasonably in obtaining medical care on his own and the new physician was properly deemed the authorized physician. However, the employee was not entitled to additional temporary disability benefits because he had reached maximum medical improvement. *Dziodosz v. Whitestone Investments, Inc.*, 2019 TN Wrk Comp App Bd LEXIS 31.

An employee alleged suffering an injury to his back when a co-worker dropped a piece of metal the two were carrying. The employee received authorized medical treatment for his injury but claimed he was entitled to additional medical treatment and temporary disability benefits. Following an expedited hearing, the trial court properly denied the employee's request for additional medical care and his request for temporary disability benefits because he provided no evidence he was unable to work as a result of the work accident. *Lara v. Progress Rail Services Corp.*, 2019 TN Wrk Comp App Bd LEXIS 33.

An employee suffered a head injury when he inadvertently walked into a glass panel, hitting his right eye on the metal door frame. The employee received authorized medical treatment for the injury but claimed he was entitled to additional medical care and disability benefits. Following a second expedited hearing, the trial court concluded the employee's medical proof was insufficient for the court to determine the employee would likely prevail at trial in establishing causation and denied the requested benefits. A neurologist's opinion that the employee's headaches are 'likely related' did not meet the requirement that the symptoms arose primarily out of the work injury. *Kassmich v. NEIS, Inc.*, 2019 TN Wrk Comp App Bd LEXIS 34.

An employee alleged suffering a shoulder injury as a result of his efforts to adjust a machine at work. The incident was reported, and the employer initially provided medical care. After the treating physician recommended surgery to repair a torn rotator cuff, the employer denied the claim, asserting the injury was idiopathic. Following a decision on the record in which the trial court denied the employee's requested medical benefits, the employee filed a second request for benefits and for an evidentiary hearing. The employer responded by filing a motion for summary judgment, which the trial court denied. Thereafter, the trial court conducted an evidentiary hearing to address the employee's request for medical and temporary disability benefits. Concluding the employee's work activities presented a hazard that led to his injury, the trial court determined the employee would likely prevail at trial in proving he suffered a work injury causing his need for medical treatment and awarded medical and temporary disability benefits. The trial court did not err in concluding

that the employee provided credible testimony explaining the work incident. *Delaney v. TPI Corporation*, 2019 TN Wrk Comp App Bd LEXIS 35.

An employee, a Georgia resident, alleged injuries as a result of a work-related motor vehicle accident that occurred in Tennessee. The Tennessee employer filed a Tennessee First Report of Injury and paid for the employee's emergency medical care in Tennessee, but subsequently denied benefits based on a dispute as to causation. The employee retained counsel and filed a claim for workers' compensation benefits in Georgia. After conducting extensive discovery in the Georgia claim, the employee filed a petition for benefits in Tennessee but continued to pursue his claim in Georgia. Following a hearing before the Georgia State Board of Workers' Compensation, the claim was dismissed for lack of subject matter jurisdiction. After the employee filed an amended petition seeking benefits in Tennessee, the employer filed a motion for summary judgment asserting the employee's Tennessee claim was barred because he had made a binding election of remedies by pursuing his claim in Georgia, which was denied. Based on the actions taken by the employee in pursuit of Georgia workers' compensation benefits, the Board concluded that the employee affirmatively acted to obtain benefits in another state and, therefore, was precluded from pursuing a claim for workers' compensation benefits in Tennessee as a result of the motor vehicle accident. The trial court's decision denying the employer's motion for summary judgment was reversed. *Goodwin v. Morristown Driver's Services, Inc.*, 2019 TN Wrk Comp App Bd LEXIS 37.

An employee reported suffering injuries to his ribs and back when he fell while pushing a wheelbarrow of wet concrete. The employer declined to provide workers' compensation benefits, asserting that the company was exempt from the requirement of obtaining workers' compensation insurance. The employee sought medical treatment on his own and filed a petition seeking medical care and temporary disability benefits. Following an expedited hearing at which the employer did not appear, the trial court found that the employee's injuries arose primarily out of his employment and that he was entitled to medical benefits, but denied the employee's request for temporary disability benefits. The employer appealed, asserting it did not receive notice of the hearing. The trial court's decision was affirmed because the employer filed a notice of appeal, but did not identify any issues on appeal, did not describe any way in which the trial court erred, provided no argument, and requested no relief. *Diaz v. Create and Construct, LLC*, 2019 TN Wrk Comp App Bd LEXIS 42.

An employee asserted the trial court erred in denying his request for temporary disability

benefits. In response, the employer asserted that the employee's appeal should be dismissed, that the appeal is frivolous, and that the employee should be required to pay the employer's attorneys' fees and costs. The request to dismiss the appeal was denied. In the absence of any meaningful argument from the employee as to how the trial court allegedly erred in its decision to deny temporary disability benefits, the trial court's order was affirmed. Although the appeal was frivolous, no attorneys' fees or other expenses were awarded. *Hayes v. Elmington Property Management*, 2019 TN Wrk Comp App Bd LEXIS 49.

An employee, a nursing assistant, was helping a patient in a chair when the patient began to fall. As she reached to catch the patient, the employee felt pain in her left shoulder and neck. Four days later, she was involved in a motor vehicle collision unrelated to her employment that resulted in pain in her leg, wrist, and elbow. The employer provided medical care but later took the position that the employee's medical conditions did not arise primarily from the work accident and that the motor vehicle accident constituted an intervening cause of the employee's conditions. Following a trial, the court properly found the employee suffered injuries arising primarily out of her employment and awarded temporary total disability benefits, permanent partial disability benefits, and future medical benefits. With respect to whether the employee's car accident was a subsequent intervening event that would break the chain of causation and relieve the employer of its obligation to provide benefits, there was insufficient proof to support a finding that either the car accident or the employee's work as a hairstylist advanced or aggravated her medical conditions. Although the medical records indicated the employee's work as a stylist may have increased her symptoms, there was no opinion in the record, expert or otherwise, that her injuries arose primarily out of either the motor vehicle accident or her work as a stylist. Rather, as the trial court concluded, the preponderance of the evidence supported the conclusion that the employee's left shoulder and neck injuries arose primarily out of and in the course and scope of her work with the employer. *Clay v. Signature Healthcare*, 2019 TN Wrk Comp App Bd LEXIS 58.

Following a work-related back injury, an employee alleged she suffered several falls at work caused by back spasms, one of which was reported to have occurred on June 8, 2016, resulting in injuries to her right foot and ankle. She filed a petition for benefits on March 7, 2018. After the employer filed a motion for summary judgment, asserting the expiration of the statute of limitations, the employee failed to respond in writing, but argued at a subsequent hearing that she "disputed everything." The trial court properly granted the employer's mo-

tion for summary judgment. The employer met its burden of production with respect to its motion for summary judgment by asserting, without contradiction, that the employee's petition for benefits was filed more than one year after the alleged injury and that the employer made no voluntary payment of benefits that would extend the time for filing a petition. The burden then shifted to the employee to demonstrate the existence of a genuine issue of material fact regarding the timeliness of her petition. She failed to do so. *Bush v. Stones River Center/RHA Health Services*, 2019 TN Wrk Comp App Bd LEXIS 68.

An employee was involved in a motor vehicle accident while riding as a passenger in a work vehicle. He asserted he sustained injuries to both arms and his right shoulder as a result of that accident. After several medical evaluations, the authorized physician concluded that the employee's medical conditions pre-existed the work accident and were not at least fifty-one percent causally related to that accident. Following an expedited hearing, the trial court properly denied the employee's interlocutory request for additional medical and temporary disability benefits. The Board agreed with the trial court that the employee did not rebut the presumption of correctness attributable to the authorized physician's causation opinion and did not come forward with sufficient proof at the expedited hearing to show he is likely to prevail at trial on the issue of medical causation. *Dennis v. Memphis Light, Gas & Water*, 2019 TN Wrk Comp App Bd LEXIS 80.

After an employee experienced a work-related injury and underwent surgery, the parties reached a court-approved settlement of the employee's claim that identified the physician who was to provide future medical care. The employee subsequently requested additional medical care, but the designated physician, as well as multiple other physicians, refused to see her, indicating no additional medical care was necessary. Following a hearing to address the employee's request for additional medical care, the trial court denied the request, concluding the employee failed to establish she was in need of additional medical treatment for her work-related injuries. The employee filed a notice of appeal but failed to identify any issues for our review, failed to file a transcript of the hearing or a joint statement of the evidence, and failed to file a brief supporting her appeal. The Board affirmed the trial court's order denying the employee's request for additional medical treatment and certified the order as final. *Tate v. BWay Corporation*, 2019 TN Wrk Comp App Bd LEXIS 81.

An employee, a stagehand union worker responsible for erecting and tearing down spaces for conferences and trade shows, was injured when a cart fell over on him. He received some authorized medical care before the employer

denied the claim on the basis of a positive drug screen. The employer also asserted the employee violated a known safety rule. With respect to the employer's intoxication defense, the trial court concluded that the employer presented insufficient proof of this affirmative defense. The employer asserted the trial court erred in reaching that conclusion, but it provided no evidence in support of its defense other than a positive drug screen. It offered no testimony from any witness that the employee appeared impaired on the date of the accident. It presented no expert medical opinion that the levels of THC or oxycodone reflected on the drug screen would have caused impairment. In short, it offered no evidence that the employee's alleged illegal drug use was the proximate cause of his injuries. The trial court also concluded the employer had not come forward with evidence to satisfy the four elements of its willful misconduct defense based on the employee's alleged violation of its "push, don't pull" safety rule. The trial court reviewed the video evidence and did not conclude it showed the employee violating the employer's safety rule while attempting to manipulate the loaded cart. Moreover, it concluded there was scant evidence of the employer's bona fide enforcement of the "push, don't pull" rule. Again, the employer presented no meaningful argument as to how the trial court erred in its analysis of the willful misconduct defense. The trial court's decision was affirmed. *Woodard v. Freeman Expositions, LLC*, 2020 TN Wrk Comp App Bd LEXIS 15.

An employee reported that his left knee gave way while he was climbing a ladder at work. The employee had suffered a work-related injury to his left knee several years before when his employer had workers' compensation coverage with a different insurer. The employee also had been diagnosed with pre-existing osteoarthritis in his left knee unrelated to his work injuries. One physician testified that the employee's current need for a total knee arthroplasty was caused primarily by his pre-existing osteoarthritis. Another physician opined that the most recent work accident caused an exacerbation of his pre-existing osteoarthritis. The trial court concluded the employee is likely to prevail at trial in proving the need for a total knee arthroplasty arose primarily from the most recent work accident, and it ordered the employer to authorize treatment, including any recommended surgery. The Board concluded that the trial court erred in concluding the employee's lay testimony and the opinions expressed by the employee's expert outweighed the unequivocal testimony of an orthopedic surgeon with respect to the need for a total knee replacement surgery. The employee was entitled to reasonable and necessary medical treatment causally related to the work accident. However, the evidence presented at the

expedited hearing did not support an order compelling the employer and its current insurer to authorize the total knee arthroplasty at this time. *Barnes v. Jack Cooper Transport Co.*, 2020 TN Wrk Comp App Bd LEXIS 16.

An employer challenged the trial court's determination that an employee's liver, kidney, and cardiac conditions, which the trial court concluded were an occupational disease, arose primarily from exposure to heavy metal contaminants in the workplace. The trial court concluded the testimony of the employee's expert witnesses should be afforded greater weight than the testimony of the employer's experts and that the employee had proven by a preponderance of the evidence that his alleged occupational diseases arose primarily out of and in the course and scope of his employment, considering all causes. The employer contended the trial court erred in finding the employee's medical experts established by a preponderance of the evidence that he suffered a compensable occupational disease arising primarily out of his employment, considering all causes. The trial court relied on the employee's experts' testimony suggesting that the employee's history of occupational exposure to heavy metals supported the reliability of the Genova Screen results, which measures the presence of heavy metals in a hair sample. Despite the admonition on the test report indicating it was a screening tool and not a diagnostic tool, they relied heavily on the Genova Screen to provide causation opinions addressing the employee's liver, kidney, and heart diseases. The Board concluded the preponderance of the evidence supported a finding that the Genova Screen was an insufficient basis to support a finding of medical causation based upon the entirety of the expert testimony presented at trial. In addition, the trial court erred in its consideration of the relative qualifications of the experts and in assigning greater weight to the causation opinions of the employee's experts. The trial court's order awarding benefits was reversed. *Johnston v. Siskin Steel & Supply Co./Reliance Steel & Aluminum Co.*, 2020 TN Wrk Comp App Bd LEXIS 23.

After filing a petition for benefits identifying the deceased worker and the existence of a dependent spouse, the attorney of record took no further action on the claim. An individual identified as the decedent's niece later participated in a show cause hearing and requested additional time to file a request for a hearing. That request was granted, and the niece filed a request for an expedited hearing. The employer responded by filing a motion to dismiss, asserting that the niece is not a member of any class of potential dependents, that the niece is not the legal representative of the decedent's estate, and that she has no standing to bring a claim for death benefits. The trial court denied the employer's motion to dismiss, determining

the motion should be treated as a motion for summary judgment because the employer relied on the niece's affidavit that was filed in support of the request for an expedited hearing. The employer has appealed. In the context of the appeal as presented, however, the Board was unable to reach the merits of the issues because: (1) the attorney filing the petition for benefits failed to file a motion to withdraw and; (2) neither the parties nor the court addressed how or why the niece was added as a party. There was no motion to withdraw as counsel, no motion to substitute parties or add a party, and no order explaining the addition of the niece as a party or a judicially-appointed representative of the estate of the decedent. In addition, a non-party who is not an attorney may not represent an injured worker, a surviving spouse, or any other litigant in a workers' compensation case. Filings made by a person purportedly representing the estate of a deceased worker in a pro se capacity cannot be considered until the court has approved the withdrawal of the attorney of record and added the judicially-designated representative of the estate as a party. Accordingly, the trial court's order denying the employer's motion to dismiss is vacated. *Ayers v. Smith & Nephew, Inc.*, 2020 TN Wrk Comp App Bd LEXIS 38.

An employee alleged she suffered work-related injuries to her neck, right arm, and shoulder while lifting a heavy box. She was evaluated by several physicians and eventually released to return to work with no permanent medical impairment. Following a trial, the court awarded temporary disability benefits and future medical benefits but declined to award any permanent disability benefits. The employer has appealed. First, the Board could not conclude the evidence preponderated against the trial court's decision to accept the opinions expressed by an authorized physician that supported the trial court's award of temporary disability benefits. Although the employer asserted that some portion of the award of temporary benefits represented a period of time after the employee had reached maximum medical improvement, the Board held that the trial court did not err in selecting a date based on the proof presented during the compensation hearing. Finally, even if the employer properly raised the issue of whether the employee's alleged noncompliance with medical treatment should bar her recovery of temporary disability benefits in the trial court, the trial court did not err in finding the employee's explanations reasonable. *Boutros v. Amazon*, 2020 TN Wrk Comp App Bd LEXIS 39.

An employee filed a petition for benefits alleging she was diagnosed with chronic obstructive pulmonary disease ("COPD") while working for the employer. Following an expedited hearing, the trial court denied the employee's request for benefits. The employer subse-

quently filed a motion for summary judgment. Concluding the employer affirmatively negated an essential element of the employee's claim based upon the doctrines of accord and satisfaction and res judicata, the trial court granted summary judgment and dismissed the employee's claim. The employee has appealed, but failed to identify any issues or make any meaningful argument on appeal. The board affirmed the trial court's grant of summary judgment in favor of the employer and certified as final its order dismissing the employee's claim. *Hardy v. Hershey Co.*, 2020 TN Wrk Comp App Bd LEXIS 43.

An employee sustained a compensable injury while working at a manufacturing plant through a temporary staffing agency. After the work accident, she returned to work for a period of time at different work sites until her temporary assignments ended. Thereafter, she received some temporary disability benefits. When those benefits were terminated, she sought additional benefits. Following an expedited hearing, the trial court ordered the employer to pay additional temporary partial disability benefits, and the employer has appealed. First, the employer asserted that the lack of clear work restrictions and the employee's lack of reasonable effort to return to work disqualified her from additional temporary disability benefits. However, the Board disagreed that the employee's work restrictions were unclear. The employee was diagnosed with post-traumatic stress disorder and restricted from working near machinery or anything resembling the setting in which she was injured. The work restriction was sufficiently clear and unambiguous to support an award of temporary benefits. Furthermore, the employee's undisputed testimony supported a conclusion that she made reasonable efforts to return to work

following her injury. Second, the employer asserted that physical work restrictions are required to support an order for additional temporary disability benefits. However, the Board agreed with the trial court's conclusion that consideration of environmental limitations resulting from a compensable mental injury is appropriate in the analysis of an injured worker's entitlement to temporary disability benefits. Third, the employer asserted the trial court erred in awarding temporary disability benefits for periods of time during which the employee already received such benefits. Thus, the Board modified the trial court's order for the payment of temporary disability benefits from a total of fifty-eight weeks to a total of forty-six and one half weeks. *Hopkins v. EmployBridge Holding Co.*, 2020 TN Wrk Comp App Bd LEXIS 45.

After significant delays on the part of the employee in taking action on his claim, the employer asked that the case be dismissed. The trial court declined, finding the employee had presented sufficient information to indicate that he intended to pursue his claim. The employer appealed. Trial courts have been charged with controlling the pace of litigation through the use of supervision and docket management which will ensure efficient disposition of civil cases. Although there is an emphasis on efficiency and timeliness, allowing a trial court to exercise discretion in controlling the pace of litigation and in efficiently disposing of its cases does not run afoul of these objectives. Furthermore, dismissals are drastic measures and are, generally, disfavored, as it is preferable to decide disputes on their merits rather than on technicalities. The trial court did not abuse its discretion in declining to dismiss the employee's claim. *Andrews v. Custom Foods of America, Inc.*, 2020 TN Wrk Comp App Bd LEXIS 46.

50-6-241. Maximum permanent partial disability awards for claims arising after July 1, 2004 but before July 1, 2014 — Public policy regarding legal immigration.

NOTES TO DECISIONS

6. Applicability of Multipliers.

Trial court did not err by accepting a psychiatrist's psychiatric impairment rating but electing not to apply any multiplier in awarding a disability for an injured employee's conversion disorder because the trial court was clearly troubled by the conflicting testimony regarding the extent of the employee's conversion disorder, which led to the employee's uncontrolled flailing, particularly in light of the employee's extensive driving activity. *Vaughn v. City of Murfreesboro*, — S.W.3d —, 2020 Tenn. LEXIS 415 (Tenn. July 24, 2020).

Trial court did not err in limiting an injured employee's award of permanent partial disability to a multiplier of less than five times the employee's anatomical impairment because, other than relying upon a psychiatric injury, the employee offered no argument as to why the employee should have received a higher multiplier for the employee's shoulder injury. *Vaughn v. City of Murfreesboro*, — S.W.3d —, 2020 Tenn. LEXIS 415 (Tenn. July 24, 2020).

50-6-242. Additional disability benefits — Award of permanent partial disability benefits for permanent medical impairment in certain cases — Specific documented findings required — Employees not eligible or authorized to work in the United States under federal immigration laws are ineligible.

Workers' Compensation Appeals Board

Decisions. Following an employee's work-related back injury, the parties entered into a settlement agreement that resolved the employee's claim for permanent partial disability benefits and allowed the employee to petition for additional disability benefits once his original compensation period expired. At the conclusion of the initial compensation period, the employee sought increased benefits, asserting that, although he had returned to work for another employer, the wages or salary he was receiving was less than the wages or salary he received from his employer on the date of his injury and was less than 70% of his pre-injury

average weekly wage or salary. The employer filed a motion for summary judgment, asserting there were no disputed material facts concerning whether the employee's wages with his new employer were greater than the wages he was receiving at the time of his injury. The trial court denied the employer's motion, concluding a genuine issue of material fact precluded summary judgment. The denial of the motion was affirmed because there was both contradictory and conflicting testimony regarding whether the employee was paid a salary or was paid an hourly rate for his work with the new employer. *Good v. Vickers Concrete Reinforcing, Inc.*, 2019 TN Wrk Comp App Bd LEXIS 26.

NOTES TO DECISIONS

4. Standard of Proof.

Employee was not entitled to relief under the escape clause that allowed a court to award greater vocational disability than allowed by the statutory multipliers because there was no

proof regarding transferable job skills or reasonable employment opportunities in the area. *Vaughn v. City of Murfreesboro*, — S.W.3d —, 2020 Tenn. LEXIS 415 (Tenn. July 24, 2020).

PART 3 OCCUPATIONAL DISEASES

50-6-306. Statute of limitations.

Workers' Compensation Appeals Board

Decisions. An employee's surviving spouse filed a petition for death benefits following the employee's death, which was caused by diseases she alleged were the result of his employment. The employer denied the claim, asserting the statute of limitations had expired, thus extinguishing the surviving spouse's claim for benefits. The trial court found there were disputed issues of material fact with respect to when the employee became incapacitated from working and denied the motion for summary judgment. On appeal, the employer maintained that the employee's statute of limitations for seeking benefits began to run when he knew or should have known he had a compensable claim, which it asserted was the date he received benefits from the federal government. Because more than one year passed between

the receipt of those benefits and the filing of the petition for death benefits, the employer contended the employee's surviving spouse was barred from receiving benefits. In order to accept the employer's position and reverse the trial court's decision and dismiss the case, the Board would have to conclude that the assignment of a medical impairment rating or the receipt of compensation for an impairment rating is conclusive proof that an injured or ill worker has been incapacitated from working. It declined to adopt such a bright-line rule. While an injured worker's anatomical impairment rating is a relevant factor to consider, the impairment rating alone does not establish that an employee is incapacitated from working. Furthermore, questions involving the commencement of the running of the statute of

limitations in workers' compensation cases most often are factual in nature, and thus summary judgment should be entered cau-

tiously. The decision of the trial court was affirmed. *Morgan v. Lockheed Martin Corporation*, 2019 TN Wrk Comp App Bd LEXIS 76.

TITLE 55

MOTOR AND OTHER VEHICLES

CHAPTER 8

OPERATION OF VEHICLES — RULES OF THE ROAD

PART 1 OPERATION OF VEHICLES — RULES OF THE ROAD

55-8-136. Drivers to exercise due care.

NOTES TO DECISIONS

1. Construction.

Trial court did not err by finding that T.C.A. § 28-3-104(a)(2) was applicable to extend the statute of limitations for plaintiff's personal injury action to two years due to defendant's traffic citation for failure to exercise due care, and therefore the trial court did not err by denying defendant's motion for summary judgment, because the traffic citation issued to defendant, which had been prepared, accepted, and the original citation filed with the court, was a criminal charge and a criminal prosecution by a law enforcement officer. *Younger v. Okbahhanes*, — S.W.3d —, 2021 Tenn. App. LEXIS 33 (Tenn. Ct. App. Jan. 29, 2021).

CHAPTER 9

EQUIPMENT — LIGHTING REGULATIONS

PART 4 LIGHTING REGULATIONS

55-9-402. Lights required on motor vehicles — Exceptions — Regulations as to color, type and visibility distance.

NOTES TO DECISIONS

4. Constitutionality of Stop.

Stop of defendant was constitutionally permissible, and defendant's motion to dismiss was properly denied because an officer had probable cause to stop defendant based on his observation that defendant did not have two "red" taillights and two "red" stoplights on the rear of the vehicle, and that defendant's right taillight was not in good condition and opera-

tional in violation of a traffic law; and, although an attempt to repair the broken taillight was made with taillight repair tape, that repair failed to allow for sufficient illumination, which provided the officer with an articulable and reasonable suspicion that defendant's taillight violated a traffic law. *State v. Rivera*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 481 (Tenn. Crim. App. July 15, 2020).

CHAPTER 10

ACCIDENTS, CRIMES AND PENALTIES

PART 2 CRIMES

55-10-205. Reckless driving.

NOTES TO DECISIONS

ANALYSIS

4. Criminal Liability.
6. —Evidence.
4. Criminal Liability.
6. —Evidence.

Evidence was sufficient to support defendant's conviction for reckless driving because a

deputy's radar unit verified that defendant was riding a motorcycle in excess of the speed limit and the deputy pursued defendant at high speeds for miles with the blue lights and the siren on the deputy's car activated until defendant turned into a driveway and parked. State v. Schmitz, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 54 (Tenn. Crim. App. Feb. 14, 2021).

PART 4 ALCOHOL AND DRUG RELATED OFFENSES

55-10-401. Driving under the influence prohibited — Alcohol concentration in blood or breath.

NOTES TO DECISIONS

ANALYSIS

9. Evidence.
10. —Sufficient.
11. —Chemical Tests.
30. Probable Cause.

9. Evidence.

10. —Sufficient.

Circuit court properly convicted defendant of DUI because the evidence established that he was in physical control of his vehicle while intoxicated, where he was standing next to the vehicle when a police officer initially passed, defendant had physical possession of the vehicle's keys, and although the vehicle's motor was not running, defendant still had the ability to direct the use of the vehicle but for his intoxicated state; in addition, defendant smelled like alcohol, slurred his speech, walked unsteadily, had .208 grams percent of ethyl alcohol in his blood, and the vehicle contained one empty bottle of whiskey and one three-fourths empty bottle of whiskey. State v. Montgomery, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 538 (Tenn. Crim. App. July 31, 2020).

There was sufficient evidence to support defendant's DUI conviction, as the trial court specifically discredited defendant's testimony that she consumed alcohol after the wreck.

Notably, the trial court found defendant not credible because she did not call the police to report the wreck, she had a BAC of 0.16 gram percent, the video of her field sobriety tests supported the officer's testimony, and defendant was not truthful with the officer about consuming alcohol. State v. Harper, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 612 (Tenn. Crim. App. Sept. 17, 2020).

Evidence was sufficient for the jury to conclude beyond a reasonable doubt that defendant was intoxicated at the time of the crash because his urine tested positive for his urine tested positive for methamphetamine, amphetamine, and oxycodone, in addition to the cognitive and speech problems observed by medical personnel at the hospital defendant was loud, uncooperative, and aggressive, he admitted to nurses that he was an IV drug user, and he admitted to taking oxycodone 38 hours before the crash. State v. Franklin, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 511 (Tenn. Crim. App. July 27, 2020).

11. —Chemical Tests.

Trial court properly denied defendant's motion to dismiss the presentment or suppress his blood test results because the State was not required to preserve samples taken for the limited purpose of determining defendant's blood-alcohol level, and the evidence was suffi-

cient to sustain his convictions of DUI per se. *State v. Bridges*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 86 (Tenn. Crim. App. Mar. 11, 2021).

30. Probable Cause.

Officers had probable cause to arrest defendant for driving under the influence because the officers found the car near midnight in the middle of a parking lot of a closed business; the

driver's door was open, and defendant was lying on his back next to the open door; the key was in the car's ignition, the engine was running, and no one but defendant was present; he told the officers that he was trying to get home; and the officers said that defendant had difficulty following their commands and that he did not seem to be in his right frame of mind. *State v. Helmick*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 758 (Tenn. Crim. App. Nov. 30, 2020).

55-10-402. Penalty for violations of § 55-10-401 — Alternative facilities for incarceration — Public service work — Monitoring — Inpatient alcohol and drug treatment.

NOTES TO DECISIONS

ANALYSIS

1. Evidence.
2. Legal Sentence.

1. Evidence.

State introduced a certified copy of defendant's 2008 judgment of conviction into evidence, which showed that he had pleaded guilty to driving under the influence (DUI), and thus the evidence was sufficient to support defendant's conviction of DUI, second offense; the 2008 judgment met all requirements of Tenn. R. Crim. P. 32(e), and as the judgment was not facially void, the trial court properly ruled it could be used to enhance defendant's sentence to DUI, second offense. *State v. Groseclose*, —

S.W.3d —, 2020 Tenn. Crim. App. LEXIS 675 (Tenn. Crim. App. Oct. 15, 2020).

2. Legal Sentence.

Trial court did not abuse its discretion by finding that defendant was not an appropriate candidate for full probation after service of the statutory minimum jail sentence, and his sentence of 11 months, 29 days to be served as 120 days in jail followed by supervised probation was upheld for his driving while intoxicated, second offense, conviction; defendant had a prior criminal history that included several felonies and numerous misdemeanors and he had violated several probation sentences in the past. *State v. Groseclose*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 675 (Tenn. Crim. App. Oct. 15, 2020).

55-10-405. Prior convictions — Driving record as evidence.

NOTES TO DECISIONS

ANALYSIS

1. Second Offense.
2. Fourth Offense.

1. Second Offense.

State introduced a certified copy of defendant's 2008 judgment of conviction into evidence, which showed that he had pleaded guilty to driving under the influence (DUI), and thus the evidence was sufficient to support defendant's conviction of DUI, second offense; the 2008 judgment met all requirements of Tenn. R. Crim. P. 32(e), and as the judgment was not facially void, the trial court properly ruled it could be used to enhance defendant's sentence to DUI, second offense. *State v. Groseclose*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 675 (Tenn. Crim. App. Oct. 15, 2020).

2. Fourth Offense.

Trial court properly used defendant's June 9, 1999 violation in finding defendant guilty of driving under the influence (DUI), fourth offense, because he had three prior DUI violations at the time of the present violation, he had a prior DUI violation occurring within 10 years of the present violation, he did not have a 10-year DUI violation-free period between any preceding prior violation, as the longest stretch between violations was nine years and nine months, and he did not have any prior violations more than 20 years from the present violation, as the June 9, 1999 violation occurred less than 20 years before the instant violation on June 6, 2018. *State v. Allen*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 717 (Tenn. Crim. App. Nov. 10, 2020).

CHAPTER 12

FINANCIAL RESPONSIBILITY

PART 1. TENNESSEE FINANCIAL RESPONSIBILITY LAW OF 1977

55-12-111. Self-insurers.

NOTES TO DECISIONS

2. Employer's Liability.

Employer was not liable pursuant to the terms of an insurance policy and the applicable statutory law when an employee of the employer was injured in an automobile accident

because the employer rejected uninsured motorist coverage from its insurer. *Evans v. Croxdale*, — S.W.3d —, 2020 Tenn. App. LEXIS 547 (Tenn. Ct. App. Dec. 2, 2020).

55-12-122. Motor vehicle liability policy — Contents.

NOTES TO DECISIONS

5. Compliance.

Rental agreement between driver and dealership satisfied the requirements of the Tennessee Financial Responsibility Law of 1977 in that the dealership warranted that it had procured a rental auto coverage insurance policy with limits equal to the minimum require-

ments, plus the driver warranted that all drivers had a valid and collectible automobile liability insurance policy in effect, which provided coverage for the driver's use and operation of the rented vehicle. *Williams v. State Farm Mut. Auto. Ins. Co.*, — S.W.3d —, 2020 Tenn. App. LEXIS 524 (Tenn. Ct. App. Nov. 20, 2020).

CHAPTER 50

UNIFORM CLASSIFIED AND COMMERCIAL DRIVER LICENSE ACT

PART 5 SUSPENSION AND REVOCATION

55-50-504. Driving while license cancelled, suspended or revoked — Minors — Forfeiture — Notice.

NOTES TO DECISIONS

8. Sentencing.

Trial court did not abuse its discretion in sentencing defendant for two counts of possession of methamphetamine with intent to sell, driving on revoked license, and possession of a controlled substance and drug paraphernalia; the sentences were within range, the trial court was free to give one mitigating factor zero

weight, and although the trial court did not reference T.C.A. § 40-35-102(5) explicitly, the sentence imposed was consistent with sentencing principles. Defendant had prior convictions and previously violated probation conditions. *State v. Declue*, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 70 (Tenn. Crim. App. Mar. 4, 2021).

TITLE 56
INSURANCE
CHAPTER 7
POLICIES AND POLICYHOLDERS

PART 1 GENERAL PROVISIONS

56-7-135. Rebuttable presumption.

NOTES TO DECISIONS

ANALYSIS

1. In General.
2. Application of Presumption.

1. In General.

2. Application of Presumption.

Insurance agent and an insurance agency were entitled to summary judgment when the

insureds alleged that the insurance agent negligently failed to procure excess uninsured motorist coverage in accordance with the insureds' instructions because the insureds failed to rebut the statutory presumption that they accepted a personal umbrella policy without excess uninsured motorist coverage by paying the premiums for the policy. *Parveen v. Acg South Ins. Agency, LLC*, — S.W.3d —, 2020 Tenn. LEXIS 587 (Tenn. Dec. 4, 2020).

PART 12 UNINSURED MOTOR VEHICLE COVERAGE

56-7-1201. Requirements and types of coverage — Presumptions — Limitations of liability.

NOTES TO DECISIONS

28. Rejection of Coverage.

Employer was not liable pursuant to the terms of an insurance policy and the applicable statutory law when an employee of the employer was injured in an automobile accident

because the employer rejected uninsured motorist coverage from its insurer. *Evans v. Croxdale*, — S.W.3d —, 2020 Tenn. App. LEXIS 547 (Tenn. Ct. App. Dec. 2, 2020).

TITLE 58
MILITARY AFFAIRS, EMERGENCIES AND CIVIL DEFENSE
CHAPTER 7
STATE VETERANS' HOMES

58-7-101. Establishment — Purpose — Funding requirements.

Attorney General Opinions. Under Tennessee state law, the Tennessee State Veterans' Homes (TSVH) may not admit veterans who received a general discharge under honorable conditions. TSVH is required to provide support and care for honorably discharged veterans who served in the United States armed

forces. An "honorable discharge" from the United States armed forces is separate and distinct from "a general discharge under honorable conditions." Furthermore, federal law does not preempt the eligibility requirements imposed by the state. To the contrary, federal law contemplates that each State will establish

eligibility and admission criteria for its state veterans' homes. OAG 20-13, 2020 Tenn. AG LEXIS 17 (6/12/2020).

TITLE 61 PARTNERSHIPS

CHAPTER 1

REVISED UNIFORM PARTNERSHIP ACT

PART 1 GENERAL PROVISIONS

61-1-101. Chapter definitions.

NOTES TO DECISIONS

2. Evidence of Partnership.

Despite a lengthy delay in the collection of a debt there was no implied partnership between an attorney and a debtor because the attorney provided legal services and submitted bills for those services to the debtor. The attorney's understanding of the attorney's relationship with the debtor and the debtor's development

project was that the attorney was a creditor, not a partner, and the attorney understood that any disbursement of sale proceeds or operational profits that the attorney might receive was for payment of the attorney's services. In re River City Resort, — B.R. —, 2021 Bankr. LEXIS 310 (Bankr. E.D. Tenn. Feb. 9, 2021).

61-1-103. Effect of partnership agreement — Nonwaivable provisions.

NOTES TO DECISIONS

1. Death of Partner.

Because a partnership agreement was silent on how to value a deceased partner's interest, the Tennessee Revised Uniform Partnership Act, T.C.A. § 61-1-101 et seq., governed and the buyout price was based on the amount that would have been distributed if a winding up of the partnership business had occurred on the

date of the partner's death and the assets of the partnership were sold at a price equal to the greater of the liquidation value or the value based on a sale of the entire business as a going concern without the partner. *Butler v. KBK Outdoor Adver.*, — S.W.3d —, 2020 Tenn. App. LEXIS 590 (Tenn. Ct. App. Dec. 22, 2020).

61-1-104. Supplemental principles of law.

NOTES TO DECISIONS

1. Implied Partnerships.

Revised Uniform Partnership Act does not preclude an existence of implied partnerships, and the statute provides that unless displaced by provisions of the Revised Uniform Partnership Act, the principles of law and equity supplement this chapter; as such, the common law principles of law and equity still apply

concerning whether an implied partnership has been formed. This was certainly so when plaintiffs in this case alleged and submitted evidence that the implied partnership came into existence prior to the adoption of the Revised Uniform Partnership Act. *Story v. Meadows*, — S.W.3d —, 2020 Tenn. App. LEXIS 591 (Tenn. Ct. App. Dec. 22, 2020).

PART 2 NATURE OF PARTNERSHIP

61-1-201. Partnership as entity.

NOTES TO DECISIONS

1. Implied Partnerships.

Revised Uniform Partnership Act does not preclude an existence of implied partnerships, and the statute provides that unless displaced by provisions of the Revised Uniform Partnership Act, the principles of law and equity supplement this chapter; as such, the common law principles of law and equity still apply

concerning whether an implied partnership has been formed. This was certainly so when plaintiffs in this case alleged and submitted evidence that the implied partnership came into existence prior to the adoption of the Revised Uniform Partnership Act. *Story v. Meadows*, — S.W.3d —, 2020 Tenn. App. LEXIS 591 (Tenn. Ct. App. Dec. 22, 2020).

61-1-202. Formation of partnership.

NOTES TO DECISIONS

2. Partnership Not Established.

Despite a lengthy delay in the collection of a debt there was no implied partnership between an attorney and a debtor because the attorney provided legal services and submitted bills for those services to the debtor. The attorney's understanding of the attorney's relationship with the debtor and the debtor's development

project was that the attorney was a creditor, not a partner, and the attorney understood that any disbursement of sale proceeds or operational profits that the attorney might receive was for payment of the attorney's services. In re *River City Resort*, — B.R. —, 2021 Bankr. LEXIS 310 (Bankr. E.D. Tenn. Feb. 9, 2021).

PART 3 RELATIONS OF PARTNERS TO PERSONS DEALING WITH PARTNERSHIP

61-1-306. Partner's liability.

NOTES TO DECISIONS

1. Applicability.

Plaintiffs did not deny that individuals were partners, or assert that they did not have an interest in the partnership; the individuals were found to be partners and thus liable for partnership obligations and the trial court did

not err by substituting the partnership and its partners as plaintiffs following the trial on damages. *Bop, LLC v. Plastic Surgery of Nashville, P.C.*, — S.W.3d —, 2020 Tenn. App. LEXIS 447 (Tenn. Ct. App. Oct. 8, 2020).

PART 4 RELATIONS OF PARTNERS TO EACH OTHER AND TO PARTNERSHIP

61-1-403. Partner's rights and duties with respect to information.

NOTES TO DECISIONS

1. Duties.

Appellants' plan to sue appellee, because it could result and had resulted in liability to the partnership, imposed an obligation on appel-

lants to state their plans as per the duties set forth in the partnership agreement and statutes. *King v. Chase*, — S.W.3d —, 2021 Tenn. App. LEXIS 104 (Tenn. Ct. App. Mar. 17, 2021).

61-1-404. General standards of partner’s conduct.

NOTES TO DECISIONS

1. Duties.

Appellants’ plan to sue appellee, because it could result and had resulted in liability to the partnership, imposed an obligation on appel-

lants to state their plans as per the duties set forth in the partnership agreement and statutes. *King v. Chase*, — S.W.3d —, 2021 Tenn. App. LEXIS 104 (Tenn. Ct. App. Mar. 17, 2021).

PART 6 PARTNER’S DISSOCIATION

61-1-601. Events causing partner’s dissociation.

NOTES TO DECISIONS

1. Withdrawal of Partner.

Because a partnership agreement was silent on how to value a deceased partner’s partnership interest, the buyout price was determined based on the amount that would have been distributed to the deceased partner if a winding up of the partnership business had occurred on

the date of the partner’s death and the assets of the partnership were sold at a price equal to the greater of the liquidation value or the value based on a sale of the entire business as a going concern without the deceased partner. *Butler v. KBK Outdoor Adver.*, — S.W.3d —, 2020 Tenn. App. LEXIS 590 (Tenn. Ct. App. Dec. 22, 2020).

PART 7 PARTNER’S DISSOCIATION WHEN BUSINESS NOT WOUND UP

61-1-701. Purchase of dissociated partner’s interest.

NOTES TO DECISIONS

1. Distribution.

Because a partnership agreement was silent on how to value a deceased partner’s partnership interest, the buyout price was determined based on the amount that would have been distributed to the deceased partner if a winding up of the partnership business had occurred on

the date of the partner’s death and the assets of the partnership were sold at a price equal to the greater of the liquidation value or the value based on a sale of the entire business as a going concern without the deceased partner. *Butler v. KBK Outdoor Adver.*, — S.W.3d —, 2020 Tenn. App. LEXIS 590 (Tenn. Ct. App. Dec. 22, 2020).

PART 8 WINDING UP PARTNERSHIP BUSINESS

61-1-801. Events causing dissolution and winding up of partnership business.

NOTES TO DECISIONS

2. Death of Partner.

Because a partnership agreement was silent on how to value a deceased partner’s partnership interest, the buyout price was determined based on the amount that would have been distributed to the deceased partner if a winding up of the partnership business had occurred on

the date of the partner’s death and the assets of the partnership were sold at a price equal to the greater of the liquidation value or the value based on a sale of the entire business as a going concern without the deceased partner. *Butler v. KBK Outdoor Adver.*, — S.W.3d —, 2020 Tenn. App. LEXIS 590 (Tenn. Ct. App. Dec. 22, 2020).

PART 12 MISCELLANEOUS PROVISIONS

61-1-1206. Applicability.

NOTES TO DECISIONS

1. Applicability.

Because a partnership agreement was silent on how to value a dissociating partner's partnership interest, the Tennessee Revised Uniform Partnership Act, T.C.A. § 61-1-101 et seq., governed the valuation of a deceased partner's

partnership interest even though the partnership was formed under the repealed Tennessee Uniform Partnership Act. *Butler v. KBK Outdoor Adver.*, — S.W.3d —, 2020 Tenn. App. LEXIS 590 (Tenn. Ct. App. Dec. 22, 2020).

TITLE 62

PROFESSIONS, BUSINESSES AND TRADES

CHAPTER 6

CONTRACTORS AND CONTRACTING

PART 1 GENERAL PROVISIONS

62-6-103. License requirement — Recovery of expenses by unlicensed contractor.

NOTES TO DECISIONS

1. Unlicensed Contractors.

In a case in which an unlicensed subcontractor was hired to install wiring and machinery for a bowling alley, and the general contractor failed to pay the subcontractor's last five invoices, because the language in T.C.A. § 62-6-103(b) did not create a new cause of action, and

the statute was consistent with the measure of damages allowed at common law, the trial court erred in dismissing the complaint based on the subcontractor's failure to assert a cause of action under this subsection. *Sifuentes v. D.E.C., LLC*, — S.W.3d —, 2020 Tenn. App. LEXIS 367 (Tenn. Ct. App. Aug. 17, 2020).

CHAPTER 35

PRIVATE PROTECTIVE SERVICES LICENSING AND REGULATORY ACT

62-35-102. Chapter definitions.

NOTES TO DECISIONS

1. Security Guards.

Trial court did not err by denying defendant's motion to suppress because the seizure of defendant's cell phone by a private security guard, licensed by the State did not constitute state action in violation of defendant's Fourth Amendment rights, as the intent of the security guard was to identify the owner of the phone, the security guard was not endowed by law

with plenary police powers such that he was a de facto police officer, and the choice of private establishments to use private security guards was not an affirmative action by the State to control, designate, or direct private security guards to act in a certain way in the course of their employment. *State v. Simpson*, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 594 (Tenn. Crim. App. Sept. 1, 2020).

TITLE 63**PROFESSIONS OF THE HEALING ARTS****CHAPTER 10****PHARMACY****PART 2 PHARMACY PRACTICE****63-10-204. Definitions.****NOTES TO DECISIONS****1. “Practice of Pharmacy.”**

Because the statute defining the practice of pharmacy does not contain a prohibition on making a medical diagnosis, it does not render a pharmacist ipso facto incompetent to express any opinion on causation for purposes of satis-

fying the statute regarding expert testimony in a health care liability action when the pharmacist’s expert opinion is otherwise admissible and relevant. *Kidd v. Dickerson*, — S.W.3d —, 2020 Tenn. App. LEXIS 443 (Tenn. Ct. App. Oct. 5, 2020).

TITLE 66**PROPERTY****CHAPTER 1****ESTATES IN PROPERTY****PART 1 GENERAL PROVISIONS****66-1-109. Estate by entireties created by direct conveyance.****NOTES TO DECISIONS****2. Construction of Language.**

Because the property at issue was held by a niece’s aunt and uncle as a tenancy by the entireties, the uncle owned the property in fee simple upon the aunt’s death; the reasonable interpretation of the language used in the deed

was that the instrument conveyed a tenancy by the entirety, thereby depriving the niece of any interest in the property. *In re Estate of Baker*, — S.W.3d —, 2021 Tenn. App. LEXIS 139 (Tenn. Ct. App. Apr. 6, 2021).

CHAPTER 4**CONTRACTS TO CONVEY REAL PROPERTY****PART 2 CHAMPERTOUS SALES****66-4-202. Sale without possession.****NOTES TO DECISIONS****29. Transaction Doubtful as to Champerty.**

trial court properly quieted title to the disputed property to the plaintiffs based on an oral

boundary agreement between the parties’ predecessors in interest because, aside from a maple tree, all three surveyors disputed the meaning and the location of the key reference

points forming the original boundary, and there was no testimony as to the condition of a fence at the time of the conveyance to the plaintiffs, which was key to the defendant's champerty

claim. *Kellerman v. Gabriel*, — S.W.3d —, 2021 Tenn. App. LEXIS 4 (Tenn. Ct. App. Jan. 6, 2021).

CHAPTER 26

EFFECT OF AUTHENTICATION AND REGISTRATION

66-26-102. Notice to all the world.

NOTES TO DECISIONS

1. Application and Effect.

Evidence preponderated against a finding that appellees' reliance on the misrepresentation in the warranty deed was reasonable; the deed of trust was recorded in 2000, placing all on constructive notice of an encumbrance on the real property, and the true facts were read-

ily available through a simple search of the public record. Because appellees failed to prove an essential element of their claim for intentional misrepresentation, the award of damages was reversed. *Erwin v. Great River Rd. Supercross, LLC*, — S.W.3d —, 2020 Tenn. App. LEXIS 545 (Tenn. Ct. App. Dec. 1, 2020).

CHAPTER 28

UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT

PART 1 GENERAL PROVISIONS

66-28-103. Purposes — Rules of construction.

NOTES TO DECISIONS

ANALYSIS

2020 Tenn. App. LEXIS 466 (Tenn. Ct. App. Oct. 21, 2020).

2. Construction.

3. Co-extensive Knowledge.

2. Construction.

Uniform Residential Landlord and Tenant Act (URLTA) was meant to promote the four clearly-stated purposes listed in T.C.A. § 66-28-103(b) and to provide remedies that are not otherwise permitted at common law; taken together, the court cannot say that the general principles of landlord non-liability are displaced by a landlord's duties under the URLTA. *Richardson v. H & J Props., LLC*, — S.W.3d —,

3. Co-extensive Knowledge.

As codified in Tennessee, the Uniform Residential Landlord and Tenant Act (URLTA) expressly provides, unless displaced by this chapter, the principles of law and equity, supplement the URLTA provisions; thus, in the absence of an express provision that negates or modifies the applicable common law principles, the co-extensive knowledge rule was applicable to this case. *Richardson v. H & J Props., LLC*, — S.W.3d —, 2020 Tenn. App. LEXIS 466 (Tenn. Ct. App. Oct. 21, 2020).

PART 3 LANDLORD OBLIGATIONS

66-28-304. Maintenance by landlord.

NOTES TO DECISIONS

1. Landlord's Liability for Dangerous Condition.

Plaintiff had knowledge of the leak in her office prior to her injury and defendants were

not liable for the injuries plaintiff sustained by slipping on the water that accumulated from the leak, as she failed to establish an exception to the general rule of landlord non-liability; her

common law negligence claim and her claim under the statute were dismissed. Richardson v. H & J Props., LLC, — S.W.3d —, 2020 Tenn. App. LEXIS 466 (Tenn. Ct. App. Oct. 21, 2020).

TITLE 67

TAXES AND LICENSES

CHAPTER 4

PRIVILEGE AND EXCISE TAXES

PART 14 ACCOMMODATIONS FOR TRANSIENTS — HOTEL OCCUPANCY

67-4-1425. Limitations on levy of tax.

Attorney General Opinions. HB 2919/SB 2925, 111th Tenn. Gen. Assem. (2020), which is intended to exempt the city of Athens from the operation of TCA § 67-4-1425(a) by means of a narrow population bracket, raises constitutional concerns. Both article I, section 8 and article XI, section 8 of the Tennessee Constitution require that a population bracket designed to exempt a particular county or municipality from a tax law be supported by some rational basis related directly to the size of the bracketed population. Because there does not appear to be such a rational basis for creating a narrow population-bracket exception from TCA § 67-4-1425 for the city of Athens, the proposed legislation raises significant constitutional concerns. OAG 20-12, 2020 Tenn. AG LEXIS 16 (6/12/2020).

CHAPTER 5

PROPERTY TAXES

PART 5 CLASSIFICATION AND ASSESSMENT — MISCELLANEOUS PROVISIONS

67-5-501. Definitions.

NOTES TO DECISIONS

13. Pipelines.

Whether locally assessed commercial and industrial pipe is correctly classified as real property or personal property requires a case-by-case analysis and application of the law of fixtures to the relevant facts; T.C.A. § 67-5-501(10)(B)(iii) does not generally apply to locally assessed piping because that piping is on the owner's property. Colonial Pipeline Co. v. TN State Bd. of Equalization, — S.W.3d —, 2021 Tenn. App. LEXIS 25 (Tenn. Ct. App. Jan. 28, 2021).
Board of Equalization properly interpreted T.C.A. § 67-5-501(10) to mean that pipes or pipelines placed by the property owners themselves, for example, at a manufacturing plant, are not permitted or authorized; piping installed on land owned in fee simple by the piping owner does not require legal approval and thus does not fall within the plain meaning of the statutory language. Here, § 67-5-501(10)(B)(iii) applied to the pipelines owned by the company but did not apply to locally assessed piping used in the manufacturing or refining process. Colonial Pipeline Co. v. TN State Bd. of Equalization, — S.W.3d —, 2021 Tenn. App. LEXIS 25 (Tenn. Ct. App. Jan. 28, 2021).

PART 15 ASSESSMENT REVIEW — STATE BOARD OF EQUALIZATION

67-5-1509. Equalization action by state board.

Attorney General Opinions. Proposed Senate Bill 2453, 111th Gen. Assem. (2020), as amended, would add the following sentence to Tenn. Code Ann. § 67-5-1509(a): "Except as provided in § 67-5-1302, real property assessments that are under appeal are not eligible for

equalization." The proposed amendment is constitutionally problematic because of its effect on appeals for non-reappraisal years. While locally assessed real property is not generally entitled to equalization, the proposed amendment could result in violation of the uniformity requirement of article II, section 28, of the Tennessee Constitution because it would prevent equalization through application of the county's ap-

praisal ratio to all locally assessed real property under appeal. Since the value of property under appeal will be determined as of the year being appealed, the appraisal ratio for that county must be applied to values determined for non-reappraisal years to bring them in line with other real property in the county. OAG 20-10, 2020 Tenn. AG LEXIS 15 (5/20/2020).

TITLE 68

HEALTH, SAFETY AND ENVIRONMENTAL PROTECTION

HEALTH

CHAPTER 3

VITAL RECORDS ACT OF 1977

PART 3 BIRTHS

68-3-305. Father's name on birth certificate — Surname of child.

NOTES TO DECISIONS

1. Best Interest.

Trial court erred in changing the surname of a child from the surname of the unmarried mother to the father's surname because there was no evidentiary support for the court's finding that changing the child's surname was in the child's best interest. There was no evidence that a felony conviction by the mother's half-

sibling had caused the mother's family name to lose respect in the community, while the court's intent to discourage the mother from future interference in the father's relationship with the child was insufficient. *Knipper v. Enfinger*, — S.W.3d —, 2020 Tenn. App. LEXIS 393 (Tenn. Ct. App. Aug. 31, 2020).

CHAPTER 11

HEALTH FACILITIES AND RESOURCES

PART 2 REGULATION OF HEALTH AND RELATED FACILITIES

68-11-272. Patient safety and quality improvement — Burden of proving bad faith and malice.

NOTES TO DECISIONS

4. Original Source Exception.

Trial court in a lawsuit alleging negligence in the treatment a doctor provided to a patient before the patient died did not abuse its discretion by admitting evidence of the doctor's voluntary surrender of the doctor's privileges to practice medicine at the hospital after the death of the patient because the evidence was

admissible under the original source exception as the attorney for the patient's survivor found the information on the Tennessee Department of Health website and used it to impeach the doctor's testimony as an expert witness. *Kanipe v. Patel*, — S.W.3d —, 2020 Tenn. App. LEXIS 433 (Tenn. Ct. App. Sept. 28, 2020).

PART 10 REGISTRY OF PERSONS WHO HAVE ABUSED, NEGLECTED, OR MISAPPROPRIATED
THE PROPERTY OF VULNERABLE INDIVIDUALS

68-11-1003. Prerequisites to including name on registry — Notice to
alleged perpetrator — Removal of name from registry.

NOTES TO DECISIONS

2. Abuse of Discretion.

Trial court did not abuse its discretion in placing defendant on the Tennessee Elderly and Vulnerable Adult Abuse Registry because defendant pawned jewelry that belonged to an elderly victim who lived in the nursing facility where defendant worked and who trusted de-

fendant to clean the victim's apartment. Defendant gave varying accounts regarding defendant's responsibility for the crime and refused to identify any other employees involved in the crime. State v. Wright, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 781 (Tenn. Crim. App. Dec. 4, 2020).

ENVIRONMENTAL PROTECTION

CHAPTER 215

TENNESSEE PETROLEUM UNDERGROUND STORAGE TANK ACT

PART 1 GENERAL PROVISIONS

68-215-119. Review of orders.

NOTES TO DECISIONS

2. Authority of Administrative Law Judge.

Second administrative judge's order exceeded the scope of his authority because neither the Uniform Administrative Procedures Act nor the Tennessee Petroleum Underground Storage Tank Act gave an administrative judge the authority to limit a party's legal arguments to the Tennessee Underground Storage Tanks and Solid Waste Disposal Control Board; and,

by doing so, the judge's order infringed not only on the Tennessee Department of Environment and Conservation's statutory right to present a brief and an oral argument expressing its legal theories, but also on the Board's responsibility to review the initial order and render a final order. Tenn. Dep't of Env't & Conservation v. Roberts, — S.W.3d —, 2021 Tenn. App. LEXIS 43 (Tenn. Ct. App. Feb. 4, 2021).

